Appeal No. 2008AP2595 **Cir. Ct. No. 2008CV737**

WISCONSIN COURT OF APPEALS
DISTRICT II

WANDA BRETHORST,

PLAINTIFF-RESPONDENT,

V.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

DEFENDANT-APPELLANT.

FILED

DEC 30, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, P.J., Anderson and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61, this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

Whether a finding of wrongful denial of benefits is a condition precedent to proceeding with discovery in a first-party bad faith claim based on wrongful denial of benefits?

In a first-party bad faith claim, if a finding of wrongful denial of benefits is a condition precedent to proceeding with bad faith discovery, does the trial court err if it refuses to grant the insurance company's motion to bifurcate the issues for discovery? Do the same policy considerations that make it error for the

trial court to refuse a motion to bifurcate simultaneous bad faith and breach of contract *claims*—avoiding undue prejudice to the insurance company, avoiding jury confusion and promoting settlement—make it error to refuse a motion to bifurcate the same two *issues* when the insured's only claim is bad faith?

BACKGROUND

This appeal arises out of an uninsured motorist (UM) claim made by Wanda Brethorst to her insurer, Allstate Property and Casualty Insurance Company. After failed settlement negotiations, where Allstate offered partial settlement and Brethorst rejected Allstate's offer, Brethorst sued Allstate for bad faith. In her complaint she alleged that "Allstate … acted in bad faith as there was no reasonable basis for Allstate denying Brethorst's claim for benefits under her policy."

Allstate filed a motion requesting "that [Brethorst's] contract claim for her personal injuries allegedly caused by the accident be bifurcated from the bad faith claim, and that discovery on the bad faith claim be stayed."

Brethorst opposed Allstate's motion, maintaining that the only cause of action set forth in her complaint was one for bad faith and, therefore, no claim to bifurcate or stay discovery can exist.

The trial court agreed with Brethorst and denied Allstate's motion to bifurcate and stay. Allstate petitioned this court for a leave to appeal the trial court's decision. We granted Allstate's petition.

DISCUSSION

Two Wisconsin cases are particularly relevant; they teach the following:

1. A single cause of action in bad faith remains viable when a simultaneous claim in breach of contract is barred by the statute of limitations. *See* ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶¶19, 39, 249 Wis. 2d 623, 638 N.W.2d 575.

2. When simultaneous breach of contract and bad faith actions are brought, policy considerations require that the trial court grant a motion to bifurcate the claims. ***Dahmen v. American Family Mut. Ins. Co.***, 2001 WI App 198, ¶20, 247 Wis. 2d 541, 635 N.W.2d 1.

In the first case, ***Jones***, Secura denied coverage for the Joneses' fire insurance policy claim. ***Jones***, 249 Wis. 2d 623, ¶5. The Joneses filed a lawsuit alleging breach of the insurance contract and bad faith. ***Id.***, ¶¶5-6. The circuit court granted summary judgment on the breach of contract claim in favor of Secura, concluding that the breach of contract claim was barred by the one-year statute of limitations under the applicable Wisconsin statute. ***Id.***, ¶6. At the same time, the circuit court denied Secura's motion for summary judgment on the bad faith claim.[1] ***Id.*** In response to the court's grant of summary judgment on the

[1] The Joneses' insurance policy was a fire insurance policy. The phrase "fire insurance" includes all types of property indemnity insurance. ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶6 n.5, 249 Wis. 2d 623, 638 N.W.2d 575. Their fire insurance policy was governed by the one-year statute of limitation found in WIS. STAT. § 631.83 (1999-2000). The tort of bad faith is governed by the two-year statute of limitations in WIS. STAT. § 893.57 (1999-2000). These statute of limitations are unchanged in the 2007-08 version. All other references to the statutes are to the 2007-08 version unless otherwise noted.

breach of contract claim, Secura filed a motion for declaratory judgment requesting that the Joneses' claim for damages as a result of the lost use of their property, lost property and lost business were not recoverable under their bad faith tort claim. ***Id.***, ¶7. The court granted Secura's motion. ***Id.***, ¶8. The Joneses appealed and, ultimately, the supreme court accepted a certification request from this court. The supreme court held that contract damages are recoverable in a bad faith tort action, even when the insured's breach of a fire insurance contract claim is barred by the statute of limitations. ***Id.***, ¶39.

Allstate argues that ***Jones*** is distinguishable because it dealt with statute of limitation issues. We do not agree and consider ***Jones*** to control. Thus, Allstate is wrong in its assertion that Brethorst *cannot bring a solo claim* for bad faith; under ***Jones***, she can.

However, this does not quash Allstate's entire appeal. Allstate also argues that Brethorst cannot obtain discovery on a first-party bad faith claim until there is a factual determination that Allstate has a duty to pay UM benefits under its policy. Brethorst disagrees and contends under ***Jones***, she is not required to prove a breach of contract claim in order to pursue her bad faith claim.

In the second case, ***Dahmen***, 247 Wis. 2d 541, ¶3, Dahmen filed an underinsured motorists claim with American Family. American Family denied the claim and Dahmen brought simultaneous actions in breach of contract and bad faith. ***Id.***, ¶5. American Family petitioned this court for a leave to appeal the trial court's decision after its motion to bifurcate the claims and stay discovery was denied. ***Id.***, ¶1. On appeal, we held that the trial court erroneously exercised its discretion in denying the insurance company's motion to bifurcate and stay. ***Id.***, ¶20. Our holding was based on the following policy considerations: (1) the

failure to bifurcate a claim of bad faith from an underlying claim for benefits would significantly prejudice the insurance company, (2) the two distinct claims present differing evidentiary requirements that increase the complexity of the issues and the potential for jury confusion, and (3) a separate initial trial on the claim of benefits increases the prospect of settlement and promotes economy by narrowing the issues for the jury and potentially eliminating the need for a later trial on the bad faith claim. ***Id.***

Brethorst argues that ***Dahmen*** is distinguishable from her case because unlike the plaintiff in ***Dahmen***—who pled two actions, one in breach of contract and one in bad faith—she only pled a bad faith action. Therefore, bifurcation of claims is not possible because she has made only one claim: bad faith. Brethorst further argues that unlike the plaintiff in ***Dahman***, she need not prove wrongful denial of benefits under the contract to proceed with her solitary claim for bad faith.

Allstate counters that Brethorst is attempting to sidestep bifurcation and all the policy considerations that it protects by pleading only bad faith. Allstate contends that Brethorst should not be allowed to obtain discovery on bad faith until there is a factual determination that Allstate has a duty to pay UM benefits under the policy. Allstate asserts that if this sidestepping is allowed, it threatens an insurance company with "having, perhaps unnecessarily, its files rummaged through; numerous documents being demanded; its adjusters being deposed; its procedures being denounced; and, generally, its business being interrupted." Allstate maintains that acceptance of Brethorst's interpretation of the law will "twist our jurisprudence" in a such a way that a claimant would be allowed to sue an insurance company for not offering enough money to settle a case, without first proving that the case is worth anything at all.

Whether Allstate's understanding, Brethorst's understanding or another interpretation is the law is the unique question yet to be determined in our jurisprudence.

We limit this certification to the issues as stated but note that a corollary issue may present when this case is ultimately sent back to the trial court because Brethorst makes the additional argument that bad faith damages may, or may not, include breach of contract damages. Thus, the question may arise whether or not a first-party claim of bad faith may occur *in the absence of coverage*?

In ***Danner v. Auto-Owners Insurance Co.***, 2001 WI 90, ¶54, 245 Wis. 2d 49, 629 N.W.2d 159, the supreme court envisaged this very issue: "Whether or not a claim of bad faith may occur in the absence of coverage is not an issue in this case because the arbitration award established legal entitlement and imposed upon [the insurers] a duty to pay." The supreme court implied it would address the issue when presented with the proper case: "We do not address in this case whether an insured may recover damages for first-party bad faith when a court determines that the policy does not cover the insured's claim." ***Id.***, ¶54 n.6.[2] This may be the proper case.

[2] In noting that coverage had already been determined, i.e., an arbitration award had established legal entitlement and imposed upon the insurer a duty to pay, the supreme court held that when a duty to pay has been established, an insurance company's duty of good faith and fair dealing exists at all times, including during the investigation, evaluation, and processing of its insured's claim.

CONCLUSION

A pronouncement of the law will immensely assist the bench and bar by making clear what is required when a plaintiff pleads a single claim of bad faith based on wrongful denial of coverage. The issues this case brings forth are novel and, importantly, ripe for clarification. For these reasons, we respectfully request that the supreme court accept certification of the issues. If this certification is accepted, the question of whether or not a first-party claim of bad faith may occur in the absence of coverage is a question the supreme court might decide to address alongside the certified questions.