COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1465 **Cir. Ct. No. 2011CV1428**

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

JUDY R. NORMAN-NUNNERY,

PLAINTIFF-APPELLANT,

V.

ARTISAN AND TRUCKERS CASUALTY COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. The circuit court granted summary judgment to Judy Norman-Nunnery on her claim that Artisan and Truckers Casualty Company breached its contract with her when it paid her claim for automobile repairs to a lienholder rather than to her or an automobile repairer. She appeals the court's

subsequent grant of summary judgment to Artisan, dismissing her claim that Artisan acted in bad faith when it paid her claim for automobile repairs to the lienholder. She argues that her bad faith claim could not be decided on summary judgment. We affirm the judgment.

BACKGROUND

¶2 Norman-Nunnery's 2007 Toyota Corolla was insured by Artisan. The insurance policy listed Santander Consumer USA as a lienholder on the Corolla. The automobile sustained collision damage during two incidents in December 2009 and May 2010. After the May 2010 incident, Artisan assessed the automobile as a total loss and paid the amount owed under the insurance policy on Norman-Nunnery's collision claim to Santander.

¶3 Norman-Nunnery commenced this action asserting breach of contract and bad faith claims. She claimed Artisan breached the contract by considering the automobile to be a total loss and making payment to Santander without notice to her and without her authorization. She explained that the breach left her without money to repair the automobile, deprived her of use of the automobile, and caused her to incur excessive storage charges while the automobile was held for repairs. She claimed Artisan acted in bad faith by declaring the automobile a total loss and paying Santander without any reasonable basis to do so.

¶4 Both parties moved for summary judgment on the breach of contract claim. The circuit court first observed that the insurance contract permitted Artisan to either pay the monetary value of the loss or repair the automobile. It then examined the competing interpretations the parties offered of the following loss payment provisions:

> **PAYMENT OF LOSS**
>
> **We** may, at **our** option:
>
> 1. pay for the loss in money, or
> 2. repair or replace the damaged … property.
>
> ....
>
> **We** may settle any loss with **you** or the owner or lienholder of the property.
>
> ....
>
> **LOSS PAYABLE CLAUSE**
>
> Payment under this Part IV for a loss to a **covered auto** will be made according to **your** interest and the interest of any lienholder shown on the **declarations page** or designated by **you**. At **our** option, payment may be made to both jointly, or to either separately. Either way, **we** will protect the interest of both. However, if the **covered auto** is not a total loss, **we** may make payment to **you** and the repairer of the auto.

(Alterations in original.)

¶5 The circuit court determined that the provisions were ambiguous and that each party's interpretation of them was reasonable. It explained that the word "may" in the final sentence with respect to payment to the insured and the repairer was reasonably viewed as merely permissive. But, when combined with the sentence opener "however," the word "may" was reasonably viewed as setting forth "a mandatory choice" as an exception to the provisions allowing payment to the insured or lienholder where the automobile was not a total loss.

¶6 Resolving the ambiguity in favor of the insured and against the drafter, Artisan, the court interpreted the provisions to authorize payment to the lienholder only when the automobile was a total loss.[1] It then considered the

[1] The circuit court adopted Norman-Nunnery's interpretation of the provisions which it explained as follows:

(continued)

parties' competing views on how to determine whether the automobile was a "total loss," a term not defined in the policy. It rejected Artisan's reliance on the definition of a salvage automobile under WIS. STAT. § 340.01(55g) (2013-14),[2] and declared the definition of "total loss" to be where the cost of repairs exceeds the pre-collision value of the vehicle. Based on that definition, the court found that Norman-Nunnery's automobile was not a total loss. Thus, the court concluded that "Artisan's payment to the lien holder Santander rather than jointly to the plaintiff and an auto repairer breached the insurance contract between the parties."[3] Accordingly, the court granted summary judgment to Norman-Nunnery on her breach of contract claim.

¶7 Artisan then moved for summary judgment dismissing Norman-Nunnery's bad faith claim based on the circuit court's determination that Artisan's interpretation of the loss payment provisions, allowing payment to the lienholder, was reasonable. The circuit court concluded that, "Artisan [was] correct." Based

> Plaintiff reads the policy to authorize payment to the lien holder only when the vehicle is a total loss.… So even if Artisan could legitimately choose to "pay for the loss in money" rather than repair the vehicle, Artisan was still required to pay the money to plaintiff and her repairer unless the vehicle is a "total loss". Worded differently, preserving for herself the option to repair a vehicle that is not a "total loss" was one of the benefits she purchased with her premium.

[2] Under WIS. STAT. § 340.01(55g), a salvaged vehicle is one that is less than seven years old that is damaged by collision to the extent that the estimated or actual costs of repair exceeds 70% of a vehicle's fair market value. Under WIS. STAT. § 342.065(1)(c), an insurer must give notice that claim has been paid that exceeds 70% of a vehicle's fair market value.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] The parties reached a settlement on the amount of contract damages.

on its prior determination that Artisan's interpretation of the loss payment provisions was reasonable, it dismissed Norman-Nunnery's bad faith claim.

DISCUSSION

¶8 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2).

¶9 A bad faith claim requires the plaintiff to "'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.'" ***Brethorst v. Allstate Prop. and Cas. Ins. Co.***, 2011 WI 41, ¶26, 334 Wis. 2d 23, 798 N.W.2d 467 (quoting ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978) (emphasis added)).

> Traditionally, to prove a first-party bad faith claim, the insured has been required to establish two elements. The first element is that there is no reasonable basis for the insurer to deny the insured's claim for benefits under the policy. This first prong is objective. The second element is that the insurer knew of or recklessly disregarded the lack of a reasonable basis to deny the claim. This second prong is subjective.

Id., ¶49 (internal quotations and citations omitted).

¶10 In this case, the court determined that Norman-Nunnery's claim failed under the first, objective prong, because the court had found, in its first summary judgment decision on her breach of contract claim, that Artisan's

interpretation of the policy was reasonable. Nevertheless, Norman-Nunnery argues that the question about the reasonableness of Artisan's decision to pay the lienholder should have been submitted to a jury because Artisan's interpretation of the policy was "unreasonable on it face." However, whether Artisan had a reasonable basis for its decision to pay the lienholder depended on the interpretation of the loss payment provisions. The interpretation of the contract is a question of law. ***State v. City of Rhinelander***, 2003 WI App 87, ¶5, 263 Wis. 2d 311, 661 N.W.2d 509; ***Erickson v. Gundersen***, 183 Wis. 2d 106, 115, 515 N.W.2d 293 (Ct. App. 1994). Courts, not juries, decide questions of law. Here, the circuit court decided that the contract was ambiguous and determined that each party's interpretation was reasonable. Thus, no question as to the objective prong of the bad faith claim remained for the jury to decide.

¶11 Norman-Nunnery suggests that Artisan's conduct at the time her claim was under submission, of "unilaterally declaring the car to be a 'total loss'" by relying on the salvage vehicle statute, was something a jury could find to be unreasonable. However, this argument appears to implicate the subjective prong of a bad faith claim, and Norman-Nunnery's failure to establish the objective prong sufficed for the circuit court to reject that claim. Even under the objective prong, Norman-Nunnery does not make a developed argument that the total loss determination sufficed, by itself, to establish bad faith. As the circuit court explained, whether or not Artisan's definition of "total loss" was incorrect was irrelevant because under Artisan's reasonable interpretation of the loss payment provisions, even if the vehicle was repairable, Artisan had the additional option of paying the auto repairer and insured, rather than only the insured or lienholder. Norman-Nunnery does not directly challenge the court's explanation. We agree

with the circuit court that the total loss determination was irrelevant to whether the payment to the lienholder was bad faith.

¶12 Norman-Nunnery's other contention is that a genuine issue of material fact existed because her expert opined that Artisan had acted in bad faith. In opposition to the summary judgment motion Norman-Nunnery filed a letter from Daniel Doucette, an individual who offered opinions about Artisan's conduct based on his fifteen years as an active trial lawyer and twenty-five years of experience within the insurance industry as a claims adjuster, a litigation supervisor, and an insurance company executive. He believed that Artisan acted in bad faith by: inappropriately using the salvage title statute to insist on declaring the automobile a total loss, ignoring industry standards and contract language to issue checks only to the lienholder, failing to protect Norman-Nunnery's interest when it knew she owed more to the lienholder than the automobile's value, using absolute values contrary to contract and industry claim standards, and failing to strike an appropriate balance between Norman-Nunnery's interests and its own. Doucette's letter is not an affidavit that may be filed to support a summary judgment motion. WIS. STAT. § 802.08(3). Additionally, Doucette's letter bears only on the second prong of the bad faith test—the subjective component regarding Artisan's knowledge or reckless disregard of the lack of a reasonable basis for its conduct. As noted above, because Norman-Nunnery did not satisfy the first prong of the bad faith test, we need not reach the second prong of the test.

By the Court.—Judgment affirmed.

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