COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2014AP1865 **Cir. Ct. No. 2007CV987**

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

ESTATE OF TODD MEISTAD, C/O ITS SPECIAL ADMINISTRATOR, GERALDINE MEISTAD,

PLAINTIFF-RESPONDENT,

V.

PROGRESSIVE UNIVERSAL INSURANCE CO.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge.[1] *Affirmed*.

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[1] The Hon. Wayne J. Marik initially presided over this case before it was transferred to the Hon. Emily S. Mueller and later transferred again to the Hon. Charles H. Constantine, who issued the challenged decision denying summary judgment to Progressive Universal Insurance Company.

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

¶1 BLANCHARD, P.J. Progressive Universal Insurance Company appeals a circuit court judgment denying its motion for summary judgment of Todd Meistad's first-party bad faith insurance claim against Progressive. For the following reasons, we affirm.

BACKGROUND

¶2 In March 2007, Meistad[2] commenced this action, claiming bad faith by Progressive in a complaint that included the following allegations.

¶3 Meistad held an auto liability insurance policy with Progressive when, on June 25, 2006, he was in a car accident. The other driver was an uninsured motorist and Meistad's policy included uninsured motorist coverage. The accident caused Meistad "serious injuries," including a cervical fracture.

¶4 Shortly thereafter, Meistad negotiated a claim for uninsured motorist coverage with Kimberly Holdsworth, acting on behalf of Progressive. During negotiations, Holdsworth told Meistad that he "should not get an attorney," because "she would see to it that he received more money" from Progressive if he did not retain an attorney. Based on this statement, Meistad did not retain an attorney.

[2] Meistad passed away during the pendency of this case and his estate was substituted as plaintiff. For the sake of simplicity, and because no distinction matters to any issue raised on appeal, we refer to the individual and his estate interchangeably as Meistad.

¶5 In August 2006, a neurosurgeon treating Meistad told him that he "was healed" and "could return to work without restriction."

¶6 Holdsworth made offers to settle the insurance case and "eventually," in or around October 2006, "convinced [Meistad] to accept $16,000.00 as well as a promise to pay an additional $3,950.00 in medical expense incurred," for a total settlement of $19,950. Based on this offer, as "induced" by Holdsworth, Meistad signed a Release and Trust Agreement on October 2, 2006, as a "full settlement and final discharge of all claims" under the policy.

¶7 Meistad returned to work after signing the release, but shortly thereafter "began to experience significant pain, discomfort, and disability in his neck area with pain shooting down his arms," forcing him to stop working. After consulting with a new physician, Meistad learned of "significant problems at the C6-C7 vertebral disc level arterially" requiring treatment and further medical costs and damages, and constituting a "permanent disability."

¶8 The March 2007 complaint alleged that Progressive "failed to perform a fair, reasonable, and objective investigation into [Meistad's uninsured motorist] claim and the injuries sustained by [Meistad] prior to inducing him to settle"; prematurely induced him "to settle within less than four months of the date of the accident"; and improperly dissuaded him from retaining an attorney.

¶9 Meistad also alleged in the complaint that he was entitled to rescission of the release because it rested on a mutual mistake of fact about the initial, favorable medical diagnosis that Meistad received. That is, Meistad alleged that the release was invalid, and requested an order "rescinding the release," because it was based on the mutually mistaken view of Meistad and Progressive that his cervical fracture had healed before Meistad signed the release.

¶10 Meistad's complaint did not include a separate claim of breach of contract, but Progressive acknowledges that a bad faith claim need not be accompanied by a breach of contract claim. *See* ***Brethorst v. Allstate Prop. and Cas. Ins. Co.***, 2011 WI 41, ¶56, 334 Wis. 2d 23, 798 N.W.2d 467 (while the plaintiff must allege insurer conduct that would constitute a breach of contract corresponding to the bad faith claim, "a first-party bad faith claim is a separate tort and may be brought without also bringing a breach of contract claim").

¶11 With the agreement of the parties, the court ordered the trial bifurcated into a first phase addressing the validity of the release Meistad signed and a second phase addressing the bad faith claim. In the first phase, Progressive filed a motion to deny rescission, arguing that the release was not invalid based on mutual mistake. Progressive contended that "no issue of material fact exists in this case due to the absence of any 'mutual mistake' as to plaintiff's condition." Meistad opposed Progressive's motion to deny rescission, asking that the release be set aside on the basis of mutual mistake.

¶12 The circuit court ruled for Progressive on this issue. The court concluded that Meistad had failed to present proof, as required to show a mutual mistake of fact, that the alleged misdiagnosis "was known to and relied upon by [Progressive] so as to have been mutual." However, the court stated in its oral ruling on this topic that in rejecting Meistad's mutual mistake argument, the court did not intend "in any way to affect or control … the bad faith claim which is asserted by [Meistad] and which has previously been bifurcated," and the court did not state otherwise in its written order on the topic.

¶13 In the second phase of the bifurcated proceedings, Progressive moved for summary judgment on the grounds that the undisputed facts submitted

by the parties demonstrated that Meistad's insurance claim "was fairly debatable when it was settled, establishing that Progressive did not engage in bad-faith." Progressive also argued that the undisputed facts showed that Progressive took "a reasonable approach to investigating the claim," that it was "quite reasonable" for Progressive "to engage in settlement discussions with Mr. Meistad," based on the information then available to Progressive, and that it would not have been bad faith for a Progressive representative to refer, as part of settlement negotiations, to the potential cost to Meistad of retaining an attorney in the negotiations. Meistad opposed this motion.

¶14 The parties then asked the circuit court to delay its ruling on the motion for summary judgment pending final resolution of a case that eventually resulted in our supreme court's decision in ***Brethorst***. Following the release of ***Brethorst***, Progressive filed a supplemental brief in support of its motion for summary judgment.

¶15 In the supplemental brief, Progressive incorporated its prior arguments for summary judgment, and added the contention that Meistad's allegations failed to satisfy one requirement provided in ***Brethorst***, namely that a first-party bad faith claim cannot be sustained unless the insured presents evidence supporting the allegation that the insurer breached an insurance policy. Progressive argued, "In this case, not only has Progressive not breached the terms of the policy,… it has fulfilled them by settling" Meistad's first-party claim. "There cannot be a breach of contract where both parties to the contract have entered a legally acceptable settlement and signed a release memorializing the settlement." Meistad responded in part that ***Brethorst*** did not change the law that Progressive had a duty to act in good faith and fair dealing toward him, as a policy

holder, "from day one of the process" and that inducing him to enter into the settlement in bad faith was "an actionable breach of contract."

¶16 The circuit court denied Progressive's motion for summary judgment, which is the decision that Progressive now challenges on appeal. The court concluded that there was "a strong basis for the continuation of prosecution of the bad faith claim." Consistent with its decision during phase one of the litigation, the court stated that the release would be "relevant evidence" at trial. Going forward, the court explained, "The issue is whether or not the settlement amount, as memorialized in the release, was, in fact, reached fairly and equitably, or in negotiating that amount Progressive demonstrated bad faith."[3]

¶17 Progressive now appeals the circuit court decision to deny Progressive's summary judgment motion during the second stage of the bifurcated process.

DISCUSSION

¶18 In the first step of summary judgment methodology, a circuit court examines "'the pleadings to determine whether a claim for relief has been stated.'" ***Brandenburg v. Briarwood Forestry Servs., LLC***, 2014 WI 37, ¶24, 354 Wis. 2d 413, 847 N.W. 2d 395 (quoted source omitted).

[3] While not pertinent to the resolution of any issue on appeal, we note the trial outcome to explain the procedural context of this appeal. The jury found that Progressive wrongfully denied Meistad a contracted-for benefit under the policy related to Meistad's accident without a reasonable basis for doing so, knowing that there was no reasonable basis for doing so or with reckless disregard on the topic, and that Progressive's conduct constituted an intentional disregard of Meistad's rights, causing damages found by the jury. Progressive does not appeal from any decision of the circuit court in connection with the trial.

> If a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist. Under section 802.08(2), [Wis.] Stats., summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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."

Id. (quoted source omitted). Appellate review is de novo, because summary judgment is "'governed by the standard articulated in section 802.08(2), and we are thus required to apply the standards set forth in the statute just as the trial court applied those standards.'" *See* ***id.*** (quoted source omitted).

¶19 We evaluate the inferences raised by summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file, in the light most favorable to the nonmoving party, here Meistad. *See* ***Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95.

I. DENIAL OF A BENEFIT UNDER THE POLICY

¶20 Progressive argues that it is entitled to summary judgment on the grounds that Meistad failed to allege in the complaint or through submissions on summary judgment that Progressive wrongfully denied him a benefit under the insurance policy, which is a requirement for a first-party bad faith claim under ***Brethorst***. We conclude that Progressive correctly cites the pertinent standard under ***Brethorst***, but reject Progressive's argument that the ***Brethorst*** standard is not met here.

¶21 We begin by observing that the arguments of the parties do not always maintain clear distinctions between allegations Meistad made in the complaint, which are subject to the first step of summary judgment methodology,

and allegations that he supported by admissible evidence, which come into play in later stages. However, in our discussion we make the distinction where it might matter.

¶22 The legal premise of Progressive's argument is correct. "[A] fundamental prerequisite for a first-party bad faith claim against the insurer by the insured" is that the insured must allege "wrongful denial of some contracted-for benefit" under the policy. *See* ***Brethorst***, 334 Wis. 2d 23, ¶¶65, 56. However, we reject Progressive's argument that its alleged "bad behavior" here is, in the terms of ***Brethorst***, "completely uncoupled from" any conduct alleged by Meistad that could constitute "a prerequisite breach of contract" by Progressive. *See* ***id.***, ¶69.

¶23 While Meistad's appellate briefing on this issue is not entirely clear, the crux of Meistad's allegations, including in the complaint, was that Progressive wrongfully denied him the benefit of uninsured motorist coverage in an amount to which he was entitled under the terms of the policy. As Meistad now argues, "In the relationship between an insurer and its insured, there is an established contract that enables the insured to obtain the benefits of the insurance policy in the event that a claim arises." Contrary to Progressive's argument, Meistad unambiguously alleged that Progressive acted in bad faith in investigating the claim, negotiating the settlement, and refusing to revisit the settlement, contrary to its contractual obligations under the policy, and thus the alleged conduct was related to or coupled with Progressive's contractual obligation to provide coverage. These allegations are sufficient to support a first-party bad faith claim under the ***Brethorst*** standard.

¶24 Progressive presents no additional argument based on ***Brethorst***. In other words, Progressive fails to explain why ***Brethorst*** supports its argument if,

as we conclude, Meistad's allegations meet the ***Brethorst*** requirement that there be an allegation of a wrongful denial of a contracted-for benefit.

¶25 Progressive asserts that "Meistad received the benefit to which he was entitled under the policy," in the form of a settlement. However, Progressive fails to explain why a settlement that was allegedly reached as a result of bad faith by the insurer could not represent a wrongful denial of the contracted-for benefit of coverage. Meistad's claim is that Progressive breached the policy by taking unfair advantage of his lesser knowledge and his circumstances, that there was no reasonable basis for breaching the policy in this way, and that Progressive either knew that there was no basis for this breach or acted in reckless disregard for whether there was a basis.

¶26 Where a policy provides coverage for a claim made by an insured, which is without dispute the case here, the insurer has a duty to investigate the claim in good faith "'before it denies *or settles*'" the claim. *See* ***Brethorst***, 334 Wis. 2d 23, ¶55 (emphasis added) (quoting 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE §§ 198:28 at 198-53 to 198-55 (3d ed. 2007)). The damages claimed by Meistad, if proven, would be "'the proximate result' of the 'duty imposed as a consequence of the relationship established by contract,'" and would not be "completely uncoupled from" or "unrelated to" a breach of contract. *See* ***Brethorst***, ¶¶67-70 (quoted source omitted).

¶27 For these reasons, we reject Progressive's argument that Meistad failed to allege that Progressive wrongfully denied him a benefit under the insurance policy, as he was required to do in order to pursue a bad faith claim.

II. REASONABLE BASIS FOR DENYING BENEFITS UNDER THE POLICY

¶28 Progressive also argues that it is entitled to summary judgment because Meistad failed to present evidence in his summary judgment submissions to support his claim that Progressive denied him benefits under his policy and in doing so, acted in bad faith. Progressive makes two primary arguments in this regard, each based on the objective component of the test for bad faith established by Wisconsin precedent, which we address in turn.

A. Request to Create and Apply a Blanket Rule

¶29 In one argument, Progressive effectively asks us to create and apply a blanket rule that, regardless of the alleged conduct of an insurer in inducing an insured to execute a release, as a matter of law a release in the hand of an insurer in all cases represents a reasonable basis to deny policy benefits to which the insured would otherwise be entitled and extinguishes the possibility of a bad faith claim. Progressive contends that "[i]t is inconceivable that an insurer would not rely on the fact that it had a release in refusing to consider post-settlement [uninsured motorist] payments," and therefore Progressive here "was entitled to debate the legal issue whether the release was valid." Progressive argues that any other approach would "eradicate the objective component" of the bad faith inquiry.

¶30 Progressive's argument relies on the long standing rule that one element of a bad faith claim is proof that the insurer lacked "'a reasonable basis for denying benefits of the policy,'" which is to be judged under an objective standard. *See* ***Brethorst***, 334 Wis. 2d 23, ¶26 (quoted source omitted). In

particular, Progressive cites to a decision of this court, which quoted a federal court of appeals opinion in part as follows:

> To remove the objective component of the test--to permit recovery against an insurer because of flaws in the investigation even though the insurer has, in fact, an objectively reasonable basis for denying coverage--would be to remove most of the protection for insurers and premium payers announced in ***Anderson*** [***v. Continental Insurance Co.***, 85 Wis. 2d 675, 693-94, 271 N.W.2d 368 (1978)], since it is almost impossible to conduct an investigation as to which some question of its adequacy, sufficient to get to the jury, cannot, in hindsight, be raised. Thus if there is an objectively reasonable basis to deny coverage, existence of investigative flaws, standing alone, are not enough to permit recovery in tort against an insurer ....

Mills v. Regent Ins. Co., 152 Wis. 2d 566, 575-76, 449 N.W.2d 294 (Ct. App. 1989) (quoting ***Pace v. Insurance Co. of N. Am.***, 838 F.2d 572, 584 (1st Cir. 1988)).

¶31 We reject Progressive's argument for adoption of a blanket rule for two reasons. First, Progressive cites no authority supporting its position that a release always represents a reasonable basis to deny benefits of a policy, regardless how the release was obtained, and we are reluctant to adopt a new rule without direction on this topic from our supreme court. Such direction is lacking despite the fact that our supreme court has addressed the basis and scope of bad faith liability extensively, including recently in ***Brethorst***.

¶32 Progressive points to public policy considerations for the proposition that allowing liability on the facts alleged by Meistad would "inject uncertainty into the handling of every first party insurance claim" and encourage frivolous lawsuits. However, even if we were free to apply public policy considerations here in the absence of supreme court guidance, and we conclude that we are not,

we would also have to consider the obvious concern that Progressive's approach would appear to risk encouraging insurers to place their own interests above those of their insureds, which would not be consistent with the rationale behind bad faith liability. *See* ***Brethorst***, 334 Wis. 2d 23, ¶35 ("The purpose behind providing a bad faith cause of action to an insured is to 'protect against the risk that an insurance company may place its own interests above those of the insured and that the recovery available to the insured for breach of contract would not fully compensate the insured for the resulting harms.'" (quoting ***Roehl Transp., Inc. v. Liberty Mut. Ins. Co.***, 2010 WI 49, ¶50, 325 Wis. 2d 56, 784 N.W.2d 542)).

¶33 Second, adoption of a blanket rule would apparently rest on the assumption that an insurer who induces an insured to sign a release could never, or would only in the rarest circumstances, do so in a manner that denies the insured access to benefits of a policy. We see no reason to make this assumption, and Progressive fails to explain why such an assumption would be justified. Under the logic of Progressive's argument, Progressive could have completely failed to investigate the claim and knowingly misled Meistad in critical ways as part of their negotiations, but so long as Meistad received a settlement of any amount on his claim and signed a release, a bad faith claim could not be sustained. We decline to adopt such a blanket rule. Indeed, as discussed in part below, we conclude that the allegations submitted to the circuit court at the summary judgment stage in this case could reasonably lead a jury to conclude that Progressive's investigation of the claim and interactions with Meistad leading to the release resulted in denial of benefits under the policy.

B. Flawed Procedures in Investigating and Settling Meistad's Claims

¶34 Progressive's second reasonable basis argument, which is not well developed, is that Progressive must be granted summary judgment because Meistad alleged in his summary judgment materials only conduct of Progressive that, at most, involved flawed procedures in investigating and settling Meistad's claim, which are not allegations that could satisfy the objective test.

¶35 However, so far as Progressive presents an argument it amounts to little more than a request that we apply to this case the blanket rule we have rejected: Meistad signed a release, and therefore coverage was fairly debatable and there could not have been bad faith in this case. Without systematically analyzing elements of the submissions of the parties on summary judgment, Progressive sweepingly asserts that "[t]here is nothing on the record in this case which would" "establish that [Meistad's] entitlement to [uninsured motorist coverage] benefits was not fairly debatable."

¶36 On our de novo review, we conclude that Meistad demonstrated that there were genuine issues of material fact on the question of whether there was no reasonable basis for denying him benefits under the policy. Among the pertinent allegations contained in Meistad's summary judgment submissions are the following:

- Averments from Meistad that Holdsworth told him, following his June 2006 injury and claim, that he "should not get an attorney because she would 'take care of'" him, and that, when he "signed the release [on October 2, 2006], [he] did not believe that would prevent [him] from making additional claims because of Holdsworth's statement that [Progressive] would 'take care of'" him.

- Progressive records reflecting that: Progressive set an internally discussed "reserve" for the claim of $40,000, which could rise to

$50,000 in the event of complications; an internally used Progressive software program set the value at $24,359-$36,559; and Holdsworth began negotiations with Meistad at $14,509 and settled at $19,459.

- Testimony by Holdsworth that she told Meistad during negotiations that he could not get an advance on any payment on his claim before the claim was resolved, and also testimony by Holdsworth that this was not true, that Meistad in fact could have received a pre-settlement advance.

- Work log notes by Holdsworth from September 26, 2006, in which she indicated in part that she had told Meistad that Progressive's offer was "very fair," and that she "did the math for him [comparing whether] I resolve with an [attorney] [or with Meistad] directly."

- Work log notes by Holdsworth from September 29, 2006, in which she indicated in part that Meistad believed that Progressive was "valuing his [claim] very low and that he [continues] to have pain and may need to seek [a second] opinion on his [injury] and whether or not any [permanent injury] was sustained." Holdsworth told Meistad that his neurosurgeon

> notes that [Meistad] is back to preloss [physical condition within] 8 weeks and may resume full activities and work. Reminded him repeatedly that his [injuries] are documented as resolved [within] 8 weeks and that is why value is where it is. He feels he could get more with an [attorney] but my sense was that he really wants more [money] as he repeatedly told me of his current debt situation. [Advised Meistad] this was tax free and could issue [payment] to him immediately. He held at [$16,000 and medical bills] and would not consider anything less. Agreed to [$16,000 and medical bills] to resolve.

- Testimony by Meistad that he went back to work at a job a few weeks after signing the release and his neck began "really hurting." He learned from a subsequent medical diagnosis that his injury was more serious than indicated by his initial medical diagnosis.

¶37 Reasonable inferences in both directions may be drawn from this evidence and there was other evidence in the summary judgment materials that appears to weigh against a finding of bad faith. However, we conclude that the above was sufficient to raise the inference that there was no reasonable basis for

Progressive to deny Meistad all of the benefits of coverage. To summarize, the following are allegations that, if credited by a jury and evaluated in the light most favorable to Meistad, could lead the jury to conclude that there was no basis for the denial of the benefits of coverage: talking Meistad out of retaining an attorney; misleading him (while he was in a "debt situation") about whether he could obtain a cash advance pending settlement; and strongly pushing settlement terms significantly below Progressive's own benchmarks during an arguably narrow window of time following a neck injury, even as Meistad reported that he continued to experience pain.

III. DECISION TO GRANT MOTION TO DENY RESCISSION

¶38 We now turn to a complicated argument Progressive makes based on the circuit court's decision to grant Progressive's motion to deny rescission in the first phase of the litigation. Progressive contends that, as a matter of law, summary judgment must be granted to Progressive on Meistad's bad faith claim because the circuit court determined in granting the motion to deny rescission that the release "was valid and enforceable," a decision not appealed by Meistad, and therefore Meistad "circumvented the trial court's finding … by arguing that he was entitled to additional [uninsured motorist] benefits under the guise of a bad-faith claim." As part of this argument, Progressive contends that, by the time the circuit court denied summary judgment to Progressive, the bad faith claim amounted to a "collateral attack" on the validity of the release. This is the case, Progressive argues, because Meistad's only chance to prove "fraud, misrepresentation of fact or inadequacy of consideration sufficient to void the release was at the time of the response" to the motion to deny rescission, and therefore "the law in this case is that no fraud was committed concerning the release."

¶39 We question multiple aspects of this argument. However, it is sufficient to explain that the argument rests on the false premise that the circuit court's ruling on the motion to deny rescission was far broader than it actually was. As summarized above, the court ruled only that Meistad had failed, during the first phase of the bifurcated litigation, to present adequate evidence of a genuine dispute as to whether Progressive was aware of the alleged misdiagnosis of his condition before Meistad executed the release. The court made clear that it intended only to take off the table mutual mistake as a basis to invalidate the release; the court expressly stated that its ruling should not be misunderstood as representing a conclusion that the bad faith claim was not viable. Therefore, we reject this argument for at least the reason that it begins with a misreading of the court's earlier decision.[4]

CONCLUSION

¶40 For these reasons, we affirm the circuit court's denial of Progressive's motion for summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[4] Having resolved the arguments on appeal in favor of Meistad for the reasons stated, we have no need to consider his additional arguments, such as that Progressive forfeited various arguments by failing to present them to the circuit court.