**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 7, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP1330** **Cir. Ct. No. 2013CV3678**

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

---

**SARA TRIPALIN AND ROBERT GINGRAS,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

---

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

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

¶1 PER CURIAM. Sara Tripalin and Robert Gingras (collectively "Tripalin") appeal an order granting American Family Insurance Company's motion for summary judgment and dismissing Tripalin's three bad faith claims against American Family. Tripalin argues that the circuit court erred in granting

summary judgment, but as we explain her arguments fail because they ignore the standards that courts are to apply to first-party bad faith insurance claims at the summary judgment stage. Accordingly, we affirm.

## BACKGROUND

¶2 The parties do not dispute the following background facts, with additional facts included as necessary in the Discussion section of this opinion.

¶3 American Family insured Tripalin's property. Tripalin filed a claim seeking coverage for damage to her roof that Tripalin claimed had been caused by a hail storm. American Family promptly responded to the claim by sending an insurance claims adjuster to investigate. After examining Tripalin's roof, the adjuster recorded doubts in his notes as to whether the roof shingles had been damaged by hail. Based on this stated uncertainty, the adjuster consulted with his supervisor and then retained an outside engineering expert to examine the roof and offer a second opinion. The adjuster's expert issued a report expressing the opinion that Tripalin's roof shingles had not been damaged by hail, but that instead the roof had defective shingles. Citing the adjuster's investigation and the expert's report, American Family denied Tripalin's claim for coverage. This initial denial forms the basis of the first bad faith claim that Tripalin makes.

¶4 Tripalin subsequently requested that American Family reconsider its decision to deny the claim for coverage. However, Tripalin did not offer American Family any new evidence or argument, but simply requested reconsideration. American Family again denied Tripalin's claim based on the opinions of the adjuster and the outside engineering expert that the damage to

Tripalin's roof shingles was not caused by hail.[1] This denial of Tripalin's request for reconsideration forms the basis of Tripalin's second bad faith claim.

¶5 Tripalin subsequently made a second request that American Family reconsider its decision to deny her claim. This second reconsideration request was accompanied by statements of opinion from some local roofing contractors that Tripalin's roof shingles had been damaged by hail. American Family again denied the claim for coverage based on the opinions of its adjuster and the outside engineering expert. This denial of the second request for reconsideration forms the basis of Tripalin's third bad faith claim.

¶6 Tripalin subsequently filed a complaint in circuit court alleging that American Family acted in bad faith on three occasions in denying her claim for coverage. In the operative complaint, Tripalin made the factual allegation that American Family had breached its insurance contract by not paying Tripalin's claim, but the complaint did not formally claim a breach of contract. For its formal claims, Tripalin asserted that three times American Family had breached its fiduciary duty of good faith and fair dealing to her as its insured: one bad faith claim for each of three occasions on which American Family denied coverage for the alleged hail damage to the roof shingles (initial denial, denial of initial request for reconsideration, denial of second request for reconsideration).

[1] In a letter responding to Tripalin's first request for reconsideration of denial of the coverage claim, the adjuster conceded one minor point. The adjuster acknowledged the existence of "light cosmetic hail impacts to the lightweight aluminum roof vents," and attached an estimate for repairs that fell within the deductible of Tripalin's policy. However, the adjuster continued to deny coverage for damage to the roof shingles.

¶7 American Family moved for summary judgment and dismissal of all three claims following limited discovery, as permitted by the circuit court.[2] After two hearings and briefing on the issues, the court granted American Family's motion for summary judgment and ordered Tripalin's complaint dismissed on the merits. The circuit court essentially concluded that the cause of damage to Tripalin's roof shingles was "fairly debatable" by American Family at all pertinent times and therefore American Family is entitled to summary judgment on each bad faith claim. Tripalin appeals.

## DISCUSSION

¶8 From start to finish, Tripalin's arguments on appeal miss the mark, because she operates from the premise that if she can point to evidence in the summary judgment submissions creating a dispute of fact about whether American Family breached its contract of insurance—that is, about whether American Family should have provided coverage due to the strength of evidence that the roof had been damaged by hail—then she must be allowed to proceed on her bad faith claims. However, under Wisconsin case law, in order to survive summary judgment on a bad faith claim the plaintiff must point to evidence in the summary judgment submissions demonstrating that the insurer could not "fairly debate" the coverage question (here, whether there was hail damage), and this Tripalin fails even to attempt to do.

[2] Tripalin makes no argument on appeal that her opportunities to conduct discovery were improperly limited by the circuit court.

¶9 We review the circuit court's grant of summary judgment de novo, applying the same methodology as the trial court.[3] *See* ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. Summary judgment is proper "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." WIS. STAT. § 802.08(2) (2013-14).[4]

¶10 Because Tripalin pursues only bad faith claims, she must provide a factual record that places in controversy that there was no reasonable basis for the denial, or in other words, that the coverage claim was not fairly debatable. Our Supreme Court has held:

> An insured choosing to pursue only a claim for bad faith must plead facts which, if proven, would demonstrate not only that the insurer breached its contract with the insured but also that there was *no reasonable basis* for not honoring the terms of the contract.
>
> A plaintiff's failure to make this preliminary showing would be grounds for the court to grant a motion for summary judgment under Wis. Stat. § 802.08(2).

***Brethorst v. Allstate Prop. & Cas. Ins. Co.***, 2011 WI 41, ¶¶78-79, 334 Wis. 2d 23, 798 N.W.2d 467 (emphasis added) (citation omitted). A bad faith claim requires the plaintiff to "'show the absence of a reasonable basis for denying benefits of the

[3] Because we review the circuit court's grant of summary judgment de novo, we need not and do not address Tripalin's argument that the court relied on an erroneous rule of law in reaching its decision to grant American Family's motion for summary judgment. Instead, we apply the summary judgment analysis independent of the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987).

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

policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" ***Id.***, ¶26 (quoting ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978)).

> 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 (citations omitted). Put differently, in order to successfully overcome American Family's summary judgment motion, Tripalin has to point to facts that would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim. *See* ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2002 WI App 46, ¶25, 251 Wis. 2d 212, 641 N.W.2d 504, *rev'd in part on other grounds by* 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789. "Absence of a reasonable basis for denying a claim exists when the claim is not 'fairly debatable.'" ***Trinity***, 261 Wis. 2d 333, ¶33 (quoted source omitted).

¶11 Bearing in mind these standards, Tripalin's claims that American Family acted in bad faith must be rejected. As set forth above, to survive summary judgment, Tripalin must point to facts that demonstrate not that American Family and its outside engineering expert were wrong in opining that hail was not the cause of the damage to Tripalin's roof, but rather she must point to facts that demonstrate that American Family's decision to deny coverage based on its expert's opinion about a lack of hail damage was not even "fairly debatable." *See* ***Ullerich v. Sentry Ins.***, 2012 WI App 127, ¶2, 344 Wis. 2d 708, 824 N.W.2d 876 (quoting ***Brethorst***, 334 Wis. 2d 23, ¶76) ("[A]n insured must … plead facts to show the coverage claim 'was not fairly debatable.'").

¶12 Tripalin seizes on the following phrase from ***Ullerich***: "an insured must demonstrate *some evidence* that the insurer's denial of coverage was unreasonable." ***Id.*** (emphasis in original). From this, Tripalin argues that she should be allowed to proceed to trial on her bad faith claims, because the "'some evidence' standard has a low threshold" and she has presented "some evidence" that the coverage denial was unreasonable. In support of her arguments, however, Tripalin offers only "some evidence" that would be pertinent to a coverage dispute (or a breach of contract claim) and none that goes toward demonstrating bad faith. In other words, Tripalin fails to point to evidence demonstrating that the coverage claim for the alleged damage to her roof "was not fairly debatable." *See* ***id.***

¶13 In arguing that American Family acted in bad faith, Tripalin asserts that the expert that American Family relied on in support of its denials of Tripalin's claim for coverage was incorrect in his conclusion that the shingles were defective, and that Tripalin has "sworn testimony ... to rebut" the expert's conclusion.[5] It is not enough to point to evidence supporting or undermining an expert's opinion in a bad faith case. Rather, to establish a bad faith denial of coverage, Tripalin would need to show that the opposing expert was so obviously wrong in his opinion that American Family could not have reasonably relied on his opinion in its decision to deny coverage. *See* ***Ullerich***, 344 Wis. 2d 708, ¶17 (quoting ***Farmers Auto Ins. Assoc. v. Union Pacific R.R. Co.***, 2008 WI App 116,

[5] Separately, we ignore the affidavits that Tripalin now calls to our attention provided by two persons involved in the original installation of the roof, because these affidavits were never presented to American Family as part of the claim review process, but instead were only created and submitted to the court in opposition to summary judgment after this lawsuit was filed. Therefore, these affidavits are not pertinent to the bad faith analysis. *See* ***Ullerich v. Sentry Ins.***, 2012 WI App 127, ¶30, 344 Wis. 2d 708, 824 N.W.2d 876 (inquiry in bad faith action is whether the claim was "fairly debatable" at the time it was submitted to the insurer).

¶28, 313 Wis. 2d 93, 756 N.W.2d 461) (observing that a "mere legitimate disagreement" between the insurer and the insured regarding coverage is insufficient to establish a bad faith denial of coverage, and upholding the circuit court's grant of summary judgment dismissing insured's bad faith claim).

¶14 We need not repeat the undisputed facts recited above regarding American Family's actions after receiving Tripalin's initial claim for coverage. Tripalin does not point to any evidence that would support a bad faith claim with respect to American Family's initial denial of the claim, putting to the side any potential for a breach of contract claim.

¶15 As to Tripalin's first request for reconsideration, American Family did not have any new information, and therefore this could not possibly have represented a bad faith denial. Indeed, before the circuit court, counsel for Tripalin conceded that "[i]f there's no bad faith on the first [bad faith claim], there's no bad faith on the second one."

¶16 Tripalin's third bad faith claim also fails. When submitting the third request on her claim for coverage to American Family, as noted above, Tripalin for the first time submitted evidence in the form of opinions from local roofing contractors, which directly challenged the conclusions of American Family's adjuster and the outside expert that Tripalin's shingles were not damaged by hail, but were instead defective. However, this was simply more evidence that could be considered in what was, so far as Tripalin's evidence shows, a "fair debate" about hail damage versus defective shingles. Evidence that made coverage fairly debatable would have defeated a motion for summary judgment by American Family on a breach of contract claim. However, Tripalin fails to explain why it is sufficient to defeat a motion for summary judgment on Tripalin's third and final

bad faith claim. *See* ***Farmers***, 313 Wis. 2d 93, ¶28 (citation omitted) ("absent an objectively unreasonable response to [a claim], we are left with a mere legitimate disagreement, which, as we have seen, is not enough to state a cause of action on the objective aspect of a bad-faith claim. Accordingly, the circuit court quite appropriately granted summary judgment ….")

## CONCLUSION

¶17 For all these reasons, we affirm the circuit court's order granting summary judgment to American Family on Tripalin's bad faith claims and dismissing the complaint in its entirety.

*By the Court*.—Order affirmed.

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