COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1311 **Cir. Ct. No. 2012CV853**

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

LAWRENCE J. OLSON,

PLAINTIFF-APPELLANT,

V.

INTEGRITY PROPERTY AND CASUALTY INSURANCE COMPANY AND GRANGE MUTUAL CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Washington County: PAUL V. MALLOY, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. In this homeowner's insurance dispute, Lawrence J. Olson appeals from a judgment dismissing Olson's claims against Integrity Property and Casualty Insurance Company (Integrity) and Grange Mutual Casualty Company (Grange).[1] Olson filed a lawsuit alleging sixty-two different claims accusing Integrity of breach of contract, intentional misrepresentation, fraud, intentional infliction of emotional distress, violation of privacy, and violation of the Wisconsin Administrative Code. As we agree with the circuit court that no issues of material fact are present, we affirm the court's grant of summary judgment on all claims.

¶2 On December 16, 2011, Olson's home in West Bend, Wisconsin, was consumed by a fire. Olson had a homeowner's insurance policy issued by Integrity. Olson claims that during the process of settling the claims for the damage, Integrity breached the terms of the insurance policy. Integrity counters that Olson was paid the proper benefits in accordance with the policy terms. Integrity brought three partial motions for summary judgment, all of which were granted, resulting in the complete dismissal of Olson's lawsuit.[2] Olson appeals.

[1] Grange is associated with Integrity.

[2] The Honorable Andrew T. Gonring issued a decision granting partial summary judgment to Integrity as to claims 2, 11, 15, and 19. The Honorable Todd K. Martens issued a decision and order on December 10, 2015, granting partial summary judgment to Integrity on claims 1, 8, 10, 14, 18, 23, 26, 33, 37, 46, 48, 52, and 53. On May 16, 2016, the Honorable Paul V. Malloy issued an order dismissing Olson's remaining claims. Judge Malloy issued the final judgment on July 27, 2016, dismissing "all the claims, counterclaims and cross-claims against Integrity" and granting costs to both Integrity and Grange.

Coverage of Dwelling & Structure/ Personal Property

¶3 The central issue in this case is a dispute over whether the language of the homeowner's insurance policy and endorsement mandate that Olson actually make repairs and replace items of personal property before being reimbursed for the full replacement value. Olson's "Homeowners Special Form HO-3 Policy" provided that "[a] covered loss … will be settled on an actual cash value basis at time of loss, but no more than the amount required to repair or replace the damaged property. Actual cash value includes deduction for depreciation." The policy further explained that "[i]n the event of a covered loss to these types of property, we will pay the smallest of: (a) the actual cash value of the damaged property; (b) the cost to repair or replace the damaged property with property of like kind and quality; (c) the limit of liability."

¶4 The policy also contained a "Homeowners Endorsement HO 511," pertaining to "Replacement Cost Coverage," which modified the standard coverage. The endorsement pertaining to replacement of personal property stated:

> We will not pay for loss under this endorsement until actual repair or replacement is made. You may disregard this condition and we will pay the actual cash value, but you have the right to make further claims within 180 days after date of loss for any additional amount incurred because of the above policy conditions.

Likewise, the endorsement pertaining to coverage on the dwelling provided: "We will pay only an amount equal to the actual cash value of your damaged property until the actual repair or replacement is complete."

¶5 Under the terms of the policy, Integrity estimated the cost of repairs to be $260,825.55. Integrity issued a check to Olson (and Olson's mortgage holder) in the amount of $207,714.63, representing "the actual cash value payment

for the damage to your home caused by fire." The amount reflected a deduction of $1000 for Olson's deductible and $52,110.92 for the "[m]aximum recoverable depreciation." By letter, Integrity informed Olson that any additional costs of replacement, which would allow Olson to recover the depreciation, would be paid once replacement was actually conducted.[3] According to the policy, "[i]f [Olson] and [Integrity] fail to agree on the actual cash value or amount of loss, either party may make a written demand that the amount of the loss be set by appraisal." Olson never demanded an appraisal and never completed repairs or rebuilt his home.

¶6 Olson also submitted two claims for personal property loss totaling over $200,000. Integrity issued two checks totaling $83,278.55, which represented the actual cash value of the personal property. Again, Integrity informed Olson that he needed to actually repair or replace the items in order to get full replacement value: "You have … recoverable depreciation remaining for these items, which you are entitled to collect once replacements of the damaged items are made." Olson never submitted documentation for payment of replacement cost.

¶7 Olson argues that the policy is ambiguous as the terms "depreciation" and "actual cash value" are not defined. Olson further claims that the policy itself is unconscionable and against public policy as he received only a portion of what he was due and was financially unable to replace his property with his own funds.

[3] The letter included a detailed analysis of the "Replacement Cost Value" for each item, fixture, and structure in the dwelling, minus depreciation.

¶8 "An insurance policy functions as a contract between the insured and the insurer." ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶19, 311 Wis. 2d 548, 751 N.W.2d 845. "Our goal in interpreting insurance contracts is to discern and give effect to the intent of the parties." ***Folkman v. Quamme***, 2003 WI 116, ¶16, 264 Wis. 2d 617, 665 N.W.2d 857. Thus, we apply insurance policy language in a way that a "reasonable person in the position of the insured would have understood the words to mean." ***Id.***, ¶17 (citation omitted). To determine whether an ambiguity exists we question whether the "words or phrases of an insurance contract, when read in the context of the policy's other language, [are] reasonably or fairly susceptible to more than one construction." ***Id.***, ¶29; *see also* ***Rosploch v. Alumatic Corp. of Am.***, 77 Wis. 2d 76, 81, 251 N.W.2d 838 (1977) ("The general rule as to construction of contracts … is that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole."). The construction of an insurance policy is a question of law properly decided on summary judgment. ***Jones v. Sears Roebuck & Co.***, 80 Wis. 2d 321, 327, 259 N.W.2d 70 (1977).

¶9 We conclude that when viewed in the context of the entire policy, the terms "depreciation" and "actual cash value" are not ambiguous. The circuit court concluded that depreciation has an ordinary, accepted definition and is not a term of art. We agree. Depreciation is "[a] reduction in the value or price of something," specifically "a decline in an asset's value because of use, wear, obsolescence, or age." *Depreciation*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* STATE OF WISCONSIN, OFFICE OF THE COMMISSIONER OF INSURANCE, PI-015, CONSUMER'S GUIDE TO HOMEOWNER'S INSURANCE 12 (2017), https://oci.wi.gov/Documents/Consumers/PI-015.pdf ("Depreciation is the decrease in home or property value since the time it was built or purchased because of age or wear and

tear."). In the context of the insurance policy and the endorsement, it is clear that the ordinary meaning of depreciation is the intended definition.

¶10 We also agree that the phrase "actual cash value" is not ambiguous. The policy states that a covered loss "will be settled on an actual cash value basis at time of loss, but not more than the amount required to repair or replace the damaged property. *Actual cash value includes deduction for depreciation*." (Emphasis added.) As 2.b(2) of section 1 of the policy further implies, "the actual cash value of the damaged property" is a separate determination from "the cost to repair or replace the damaged property." The policy's explanation of actual cash value is consistent with the Consumer's Guide to Homeowner's Insurance, published by the Wisconsin Office of the Commissioner of Insurance, which discusses the difference between actual cash value and replacement cost. The guide defines replacement costs as "the amount it would take to replace or rebuild your home or repair damages with material of similar kind and quality," and it defines actual cash value as "the value of your property when it is damaged or destroyed," which is "usually figured out by taking the replacement cost and subtracting depreciation." STATE OF WISCONSIN, OFFICE OF THE COMMISSIONER OF INSURANCE, PI-015, CONSUMER'S GUIDE TO HOMEOWNER'S INSURANCE 12 (2017), https://oci.wi.gov/Documents/Consumers/PI-015.pdf. The definition of actual cash value is clear when considered in the context of Integrity's policy.

¶11 Olson further argues that Integrity's policy is unconscionable and against public policy as it is "unfathomable to think an unemployed Appellant, living with his children in a hotel, having no financial resources" should be forced to rebuild his home and replace his personal property before being paid under the policy terms. Integrity maintains that ***Farmers Automobile Insurance Ass'n v.***

Union Pacific Railway Co., 2008 WI App 116, 313 Wis. 2d 93, 756 N.W.2d 461, demonstrates approval with the provisions of the policy and the endorsement.

¶12 In ***Farmers***, as in this case, the insured's home was destroyed by fire. ***Id.***, ¶2. When the insurer settled the claim for a portion of what the insured claimed was the "actual replacement value of the home," the insured filed suit. ***Id.*** Like the policy in this case, the insurance policy provided that "[w]e will not be liable for any loss under this endorsement until actual repair or replacement is completed." ***Id.*** We approved of the language, finding that the clause providing that the insurer "need not pay for the replacement of a home until 'replacement is completed' is neither substantively nor procedurally unconscionable." ***Id.***, ¶33. Importantly, we explained that it is

> perfectly commercially reasonable for the insurance policy to provide that the company will not have to pay for a home's replacement cost until that replacement is complete. Indeed, paying a replacement cost without ensuring that the insured actually used the money to replace his or her home would tend to induce some insureds to take the money and run, and would be commercially *un*reasonable.

Id., ¶35 (alteration in original).

¶13 Likewise, in ***Goldstein v. Fidelity & Guaranty Insurance Underwriters***, 86 F.3d 749 (7th Cir. 1996), the Seventh Circuit Court of Appeals similarly found that the terms of the insurance policy, requiring "that the property actually be repaired or replaced as a precondition to payment" of the "depreciation 'holdback,'" were "clear" and the lower court "was correct to grant summary judgment in favor of [the insurer]." ***Id.*** at 753-54. The court further noted that the insurer "agreed to insure the … property against loss or damage, not against the financial ups and downs of its owner. Goldstein's attempt to blame Fidelity for

his lack of liquidity (he was going through a divorce at the time and had financial problems) misrepresents the nature of their contractual relationship." ***Id.*** at 754.

¶14 Olson cites no statutory or case law finding similar policy language either ambiguous, unconscionable, or against public policy. The terms of Olson's and Integrity's contractual relationship are clear. Integrity's policy, requiring that Olson actually make repairs and replace items of personal property before being reimbursed for the full replacement cost of the items or dwelling, is not unconscionable or ambiguous. As Olson did not provide evidence to Integrity that he repaired or replaced his property, Olson is not entitled to the full replacement value of his property, and we affirm the circuit court's grant of summary judgment to Integrity on this issue.

Loss of Use

¶15 After the fire damaged Olson's home, Olson and his children stayed in a hotel. Integrity attempted to find Olson suitable housing, but Olson spurned its attempts, and when Integrity later refused to pay for further hotel costs, Olson moved in with his mother. Olson claims Integrity breached the policy terms by paying less than the policy limit of $61,600 for loss of use. Integrity paid for seven months of alternative living expenses for Olson and his family, after determining that it would only take four months to rebuild Olson's home had he decided to do so.

¶16 Integrity's policy for "loss of use" provides:

> If a covered loss makes your residence premises uninhabitable, we will pay the reasonable increase in your living expenses necessary to maintain your normal standard of living while you live elsewhere.
>
> Our payment is limited to increased costs you incur *for the shortest of*:

> 1. the time required to repair or replace the damaged property;
>
> 2. the time required for your household to settle elsewhere; or
>
> 3. 12 months. (Emphasis added.)

Olson argues that "a reasonable reading of [the loss of use provision] would allow [Olson] to decide whether to rebuild, resettle or do nothing for twelve months and receive payments up to the Policy limits of $61,600.00." Olson does not provide any legal support for his reading of the policy provision, and he does not address the effect of "the shortest of" language.

¶17 The circuit court found it "undisputed" that "Integrity made extensive efforts to find suitable accommodations for" Olson. Integrity estimated that it would take four months to repair or rebuild a home comparable to Olson's home, but Integrity paid for seven months. Olson provided no admissible evidence to refute the four month timetable, and he provides no evidence of any additional living expenses that he incurred during this period. The policy necessitates payment for the *lesser* of the time needed to rebuild or resettle elsewhere. There was no breach, and the circuit court properly granted summary judgment on this issue.

Removal of Debris

¶18 Olson never removed the debris from his property after the fire. Instead, two years later, the Town of Trenton forcibly razed the property and charged Olson $10,570.55. Integrity's policy provides that "[w]e will pay reasonable expenses *you incur* to remove debris of covered property." (Emphasis added.) A portion of the original "actual cash value" payment included debris removal expenses of $10,460 less depreciation of $2092 for a total actual cash

value of $8368. Olson claims that the policy does not allow Integrity to depreciate the estimate to remove the debris, and further that the debris removal payment was included in the actual cash value payment, which was handed over to Olson's mortgagee, so Olson could not use those funds for debris removal.

¶19 The policy clearly provides that Integrity will pay the reasonable expenses "you incur" to remove the debris on the covered property. It is undisputed that Olson never removed the debris, so he was not entitled to any additional payments for expenses that he incurred. Olson was provided the actual cash value of the debris removal per the policy terms, and he provides no support for his assertion that Integrity could not depreciate the payment for the debris removal. Olson was required under the terms of the policy to "protect the property from further damage, making necessary and reasonable repairs to protect the property, and keep records of the costs of repairs." He failed to do so, which necessitated the Town of Trenton stepping in to remedy the situation. Integrity did not breach the contract.

¶20 The debris removal argument also relates to Olson's claims regarding the replacement of his home's foundation. Olson's home sat partially on top of a large garage floor made of precast concrete (a/k/a "Spancrete™") with a large room directly below it. Olson claims the estimate to rebuild Olson's home did not include replacing the Spancrete as Integrity had hoped to reuse it, and, therefore, the actual cash value amount provided by Integrity was incorrect. Integrity argues it had hoped to reuse the Spancrete, but it was not able to view the

Spancrete to assess whether it needed replacement until the debris was removed, which was never done.[4]

¶21 Integrity did make payment to Olson for the actual cash value of the Spancrete. The letter from Integrity to Olson on February 17, 2012, included an assessment for replacing/repairing the Spancrete, less the depreciation, for a total of $1,015.09. As Integrity explained, if Olson did not agree with the actual cash value amount he could have, under the terms of the policy, demanded an appraisal in writing. Olson never replaced or repaired the Spancrete foundation, and, therefore, he was not entitled to any additional funds under the policy. Again, there was no breach.

Marital Property

¶22 At the time of the fire, Olson was married, but separated, and his wife was no longer living in the home. The residence, however, was marital property subject to division.[5] As part of the divorce proceedings, the family court issued an order providing that "[b]oth parties are restrained from" "[e]ncumbering, disposing of, transferring, or removing from the state any asset except in ordinary course of business or as otherwise agreed between the parties." After receiving

[4] Integrity eventually inspected the Spancrete on December 27, 2012. Olson asserts there is a question of fact as to whether Olson removed debris, claiming he "removed debris from on top of the Spancrete so [Integrity] could inspect it, but [Integrity] did not until four months after [Olson] filed suit. [Olson] rented dumpsters and equipment and paid others to help gut his home but because [Integrity] paid the debris removal payment to [Olson's] bank, [Olson] financially could not afford to remove his home." Olson does not assert when the alleged debris removal occurred, but, regardless, the policy terms are clear and Olson never submitted claims to Integrity for the removal of the debris and the debris was obviously not completely removed as the Town of Trenton was forced to raze the property.

[5] The family court order provided that Olson would "have temporary use of the parties' residence and household furnishings and contents except as ordered/agreed."

the order from Olson's wife's attorney, Integrity issued the checks for Olson's personal property claims in the name of Olson and his wife.

¶23 Olson argues that he was the sole insured on the policy and that the policy would only include the insured's spouse if they were living in the same household. According to Olson, "[i]f the insured property is destroyed, as in this case, the interest of the spouse in the property is destroyed." Olson cites no legal authority for this proposition. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). He also claims that Integrity should have obtained a court order if it believed that his wife should have been included on the payments, but also cites no authority for that claim.

¶24 Integrity relies on the language of the temporary order and the policy language, providing that "we will not pay more than the insurable interest of an insured person," to find that it was reasonable, appropriate, and necessary to issue the payments jointly. *See also* ***Stebane Nash Co. v. Campbellsport Mut. Ins. Co.***, 27 Wis. 2d 112, 120, 133 N.W.2d 737 (1965) ("[T]he general rule is that the insured is limited in recovery to the value of his actual interest in the property insured." (citation omitted)). The circuit court agreed, finding that Olson's wife had a legal interest in the insurance proceeds. We concur. Olson and his wife were not divorced at the time of the fire, and Olson's wife had an interest in the property under Wisconsin's marital property laws. *See* WIS. STAT. § 766.31 (2015-16).[6] Olson certainly had the right to bring the issue of the checks before the family court if he felt that his wife should not be entitled to any of the funds

[6] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

provided under Integrity's policy. Under these facts, however, Integrity acted appropriately.

Invasion of Privacy

¶25 Olson also claims that Integrity invaded his privacy by communicating with his wife and her attorney regarding the insurance policy. In an action for invasion of privacy under WIS. STAT. § 995.50, Olson must prove:

> (1) there has been a 'public disclosure' of facts …, (2) the facts disclosed were private, (3) the private matter is one that would be highly offensive to a reasonable person of ordinary sensibilities, and (4) the [party] acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter or with actual knowledge that none existed.

Olson v. Red Cedar Clinic, 2004 WI App 102, ¶8, 273 Wis. 2d 728, 681 N.W.2d 306.

¶26 The circuit court found that "it is undisputed that the estranged spouse demonstrated her legal interest in the insurance proceeds." The court further concluded that none of the elements of this action were alleged by Olson. We agree. Olson makes a conclusory statement that he alleged all the elements of invasion of privacy, but his complaint merely states that Integrity "discussed details about the policy." There is no evidence of what exactly was shared with Olson's wife or her attorney that would demonstrate a situation that is "highly offensive to a reasonable person" or how this was a "public disclosure" when Olson's wife had a legal interest in the property. It was proper for the circuit court to grant summary judgment.

Bad Faith Claims

¶27 It was proper for the circuit court to dismiss Olson's bad faith claims as it found no breach of contract. "[S]ome breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured." ***Brethorst v. Allstate Prop. & Cas. Ins. Co.***, 2011 WI 41, ¶65, 334 Wis. 2d 23, 798 N.W.2d 467. "To show a claim for bad faith, a plaintiff must 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. ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). Here, as discussed above, there is no evidence that Integrity failed to comply with the terms of the policy or demonstrate that Integrity's actions were unreasonable.

Wisconsin Administrative Code Claims

¶28 Olson's final claims fall under WIS. ADMIN. CODE § INS 6.11(3)(a), (b) (Feb., 2000). The case law is clear that there is no private right of action for these claims. *See* ***Kranzush v. Badger State Mut. Cas. Co.***, 103 Wis. 2d 56, 81, 307 N.W.2d 256 (1981) ("[W]e conclude that [WIS. ADMIN. CODE §] INS 6.11 does not contain such an [intent to create a private right of action]. To find in rule INS 6.11 an implied private right of action in favor of a claimant would, we think, be inconsistent with its function as an aid to the interpretation and

implementation of the insurance statutes."). These claims were properly dismissed.[7]

By the Court.—Judgment affirmed.

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

[7] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).