

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-0122
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-299

**IN COURT OF APPEALS
DISTRICT III**

DON A. PATENAUDE,

PLAINTIFF-APPELLANT,

V.

SAFECO INSURANCE COMPANY OF AMERICA,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Don Patenaude appeals a summary judgment dismissing his breach of contract and bad faith claims against Safeco Insurance Company of America. We conclude that Patenaude failed as a matter of law to comply with the terms of his insurance policy by refusing to submit to examinations under oath. We affirm the judgment.

BACKGROUND

¶2 Patenaude purchased a one-year homeowner's insurance policy from Safeco to cover a house in Oconto. The policy provided replacement coverage for a fire loss to the house and Patenaude's personal belongings. The policy was in effect on June 5, 1999, when a fire destroyed the house and its contents. Patenaude was on a Canadian fishing trip at the time of the fire. He returned late at night on June 5 and discovered that his house and its contents were a total loss. Patenaude's mother reported the fire to Safeco on June 7. Both fire department reports and Safeco's expert who inspected the fire scene opined that the fire at Patenaude's house was arson.

¶3 Pursuant to the insurance contract, Patenaude filed a proof of loss for the damage to his house and personal property. Patenaude also provided the following information to Safeco: (1) a statement of value for the loss of his residence; (2) a two-page inventory of the personal property lost in the fire; (3) a written statement from the five men who were on the Canadian fishing trip with him; (4) a Canadian fishing license; and (5) a receipt from the fishing resort where he and his fishing partners lodged. However, Patenaude provided no documentation for any of the losses on the inventory or his proof of loss.

¶4 Mark Thomas, a Safeco investigator from Chicago, tape-recorded an interview with Patenaude in August 1999. Thomas asked Patenaude over 300 questions about the fire's origin, his whereabouts at the time of the fire and the damages to the property. At the end of the interview, Patenaude executed a Safeco "Authorization to Obtain Information." The authorization permitted Safeco to obtain any information about Patenaude's (1) credit problems and status, (2) criminal convictions and background, (3) insurance claims and previous

applications, (4) medical and psychological histories, (5) utility service payments and nonpayments and (6) all other financial information.

¶5 James Baxter, Safeco's legal counsel, wrote Patenaude a letter asking him to appear for an examination under oath on February 15, 2000. Baxter advised Patenaude that the insurance policy required him to submit to the examination. Baxter requested that Patenaude produce a number of documents before the examination and advised him that the insurance policy required him to produce the documents. Baxter advised Patenaude that he could have counsel present and that the date could be altered if it was inconvenient. Finally, Baxter indicated that he also would like to interview Patenaude's mother because she "was involved in the procurement of this insurance as well as the claims process." No provision in Patenaude's insurance policy required him to deliver third parties for examination, but Safeco never argued that her presence was mandatory or that it would be relieved of the obligation to pay if she was not produced for examination.

¶6 Patenaude's attorney contacted Baxter and conditioned Patenaude's appearance at an examination on a promise from Safeco to settle the claim. Baxter indicated that Safeco was still investigating the claim and wanted Patenaude's examination under oath as part of its investigation. At that point, counsel responded that he did not want to waste time and would sue instead. The examination never took place, and Patenaude never produced any of the documents Safeco requested.

¶7 Patenaude filed suit against Safeco and alleged that (1) Safeco breached its contract with Patenaude by nonpayment of his fire loss claim¹ and (2) Safeco's failure to pay his claim was bad faith. Safeco alleged as an affirmative defense that Patenaude breached his various duties of cooperation under the policy, made misrepresentations and engaged in fraudulent conduct in his dealings with Safeco.

¶8 Safeco filed a motion for summary judgment and argued that Patenaude's failure to submit to an examination under oath and provide the requested documents violated the terms of the insurance policy as a matter of law. The trial court granted summary judgment because it determined that Patenaude breached the contract as a matter of law by his lack of cooperation with Safeco's investigation. The court also found that Patenaude's bad faith claim could not survive after the breach of contract claim was dismissed. Patenaude now appeals.

STANDARD OF REVIEW

¶9 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). 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. WIS. STAT. § 802.08.

¹ Safeco never denied Patenaude's claim. It wanted Patenaude's examination under oath and the requested documents to conclude the investigation of the claim.

DISCUSSION

¶10 Patenaude argues that (1) his duty to cooperate with his insurer is not breached unless the breach is “substantial,” and (2) whether a breach is substantial is a fact question for the jury. Safeco argues that the duties to cooperate enumerated in its insurance policies are conditions precedent to payment on a claim. Safeco alternatively argues that Patenaude’s combined failure to provide an examination under oath and requested documents is, as a matter of law, a substantial failure to cooperate.

¶11 We conclude that Patenaude, as a matter of law, failed to substantially cooperate with Safeco’s investigation of his claim by not submitting to an examination. Because we agree with Safeco that Patenaude’s failure to submit to an examination constituted a substantial breach of his duties under the insurance policy, we need not address whether fulfillment of an insured’s duties are conditions precedent to the payment of a claim.²

¶12 Patenaude argues that an insured must substantially breach the duty to cooperate in order to breach the duties under the insurance policy. Safeco points out that the cases Patenaude relies on to establish this standard are liability insurance contract cases. In liability cases, the insured’s general duty to cooperate differs from a claim made under a property contract because the court must also

² Safeco maintains that fulfillment of the insured’s duties under an insurance policy is a condition precedent to payment of a claim. While we are concerned that this standard could invite insurers to assert minor, technical failure to deny meritorious claims, we do not specifically decide whether the duties are conditions precedent to making a successful property damage claim. We need not resolve this issues because, even under Patenaude’s substantial breach test, he failed as a matter of law to comply with the terms of the insurance policy.

protect third party claimant's interests in liability. See *Dietz v. Hardware Dealers Mut. Fire Ins. Co.*, 88 Wis. 2d 496, 503-04, 276 N.W.2d 808 (1979).

¶13 The duties on an insured to cooperate are intended in part to avoid litigation by permitting the insurer to fully and fairly evaluate the claim. See *id.* at 502-03. These duties are especially important to an insurance company that is evaluating a claim arising out of suspected arson. Patenaude's refusal to submit to an examination and filing of the lawsuit caused the insurance policy clauses to fail in one of its essential purposes, avoiding litigation. Even if Patenaude is correct and the lack of cooperation must be substantial, his lack of cooperation with Safeco's investigation fulfills that standard as a matter of law.

¶14 The terms of the insurance policy provide Safeco with the opportunity to examine its insured under oath before making a decision about a claim. The insured has the best information about the property, the fire and the loss. The insurance company is entitled to the best quality information and full disclosure before it decides whether to pay a claim. We further conclude that the insurer has the right to have enforced the requirement that the penalty for making knowingly false claims may be greater than simply losing the gamble that a spurious claim will be denied. In this case, there were real questions about the actual claims being made, and Patenaude did not provide meaningful supporting documentation.

¶15 Although Patenaude claims it is undisputed that he had nothing to do with the arson, Safeco disagrees. Patenaude claims that he gave a statement "under oath" to Thomas. We agree with Safeco that Patenaude's and his mother's affidavits, reciting that Thomas told them their statements would be under oath, should not be considered. These affidavits were not filed with the court until after

its written decision.³ When the issues are known and Patenaude has information relevant to those issues, we hold that he may not wait until the court renders its decision to submit additional alleged evidence.

¶16 Moreover, because the affidavits were not properly before the trial court, it is undisputed that Patenaude never gave a statement after having been administered an oath to tell the truth. Finally, as Safeco also points out, under the policy, Patenaude had a duty, within reason, to give multiple statements under oath. Even if we considered the August 1999 taped interview an examination under oath, two statements under oath certainly would have been reasonable. When Patenaude refused to submit to an examination, he substantially breached his duty to cooperate with Safeco's investigation as a matter of law. Safeco thereby was released from any obligation to pay Patenaude's claim under the insurance policy.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

³ Even if Patenaude's affidavits had been timely filed, they do not establish that his statement to Thomas was under oath.

