COURT OF APPEALS
DECISION
DATED AND RELEASED

July 18, 1995

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

NOTICE

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

No. 94-1500

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

CAPITOL INDEMNITY CORPORATION,

Plaintiff-Appellant-Cross Respondent,

v.

WILD GOOSE INN, INC.,

Defendant-Respondent-Cross Appellant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Capitol Indemnity Corporation appeals from the trial court's denial of its claimed set-off for its mortgage payment to Norwest Bank on behalf of the mortgagor, Wild Goose Inn, Inc. Wild Goose Inn cross-appeals from the trial court's grant of summary judgment to Capitol Indemnity on Wild Goose Inn's claim for bad-faith denial of coverage.

The Wild Goose Inn, a supper club and bar in Waupun, was damaged by fire on December 31, 1991. Wild Goose Inn filed a claim with Capitol Indemnity, its insurer, on June 25, 1992. Capitol Indemnity denied coverage for the loss, claiming that the fire was intentionally set by Frank Dohrwardt, co-owner of the business with his wife Barbara, or by his agent.

Capitol Indemnity brought this action against Wild Goose Inn and its mortgagee, Norwest Bank, for a declaratory judgment under § 806.04, STATS., that Wild Goose Inn was not entitled to recover for its loss under its policy with Capitol Indemnity. Wild Goose Inn counterclaimed for the amount of its fire loss and for actual and punitive damages based on Capitol Indemnity's alleged bad faith in denying the claim. Capitol Indemnity contends that it paid Norwest Bank $347,686 on Wild Goose Inn's mortgage debt of $390,000, and that it took an assignment of the mortgage from the bank.[1] The trial court granted partial summary judgment to Capitol Indemnity, dismissing Wild Goose Inn's claims for bad faith and punitive damages. Wild Goose Inn made a statutory offer of settlement on November 8, 1993, which was rejected. After trial, the jury returned a verdict for Wild Goose Inn for $828,487 on its damage claim. The verdict exceeded Wild Goose Inn's offer of settlement.

I.

Capitol Indemnity appeals on two grounds. First, it argues that it is entitled to a set-off from the jury verdict of its payment to the mortgagee. Second, it argues that it is not obligated to pay twelve percent interest on that amount of the jury verdict it allegedly paid to Norwest Bank. We address these issues in turn.

The interpretation of a contract is a question of law that we review *de novo*. ***Edwards v. Petrone***, 160 Wis.2d 255, 258, 465 N.W.2d 847, 848 (Ct. App. 1990). If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning. ***Waukesha Concrete Prods. Co., Inc. v. Capitol Indem. Corp.***, 127 Wis.2d 332, 339, 379

[1] Norwest Bank was dismissed from this action by stipulation.

N.W.2d 333, 336 (Ct. App. 1985). Capitol Indemnity's policy of insurance issued to Wild Goose Inn contains the following provision:

F. ADDITIONAL CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

....

2. Mortgage Holders

....

b. We will pay for covered loss of or damage to buildings or structures to each mortgage holder shown in the Declarations in their order of precedence, as interest may appear.

c. The mortgage holder has the right to receive loss payment even if the mortgage holder has started foreclosure or similar action on the building or structure.

d. If we deny your claim because of your acts or because you have failed to comply with the terms of this Coverage Part, the mortgage holder will still have the right to receive loss payment if the mortgage holder:

(1) Pays any premium due under this Coverage Part at our request if you have failed to do so;

> **(2)** Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so; and
>
> **(3)** Has notified us of any change in ownership, occupancy or substantial change in risk known to the mortgage holder.
>
> **e.** If we pay the mortgage holder for any loss or damage and deny payment to you because of your acts or because you have failed to comply with the terms of this Coverage Part:
>
> **(1)** The mortgage holder's rights under the mortgage will be transferred to us to the extent of the amount we pay; and
>
> **(2)** The mortgage holder's right to recover the full amount of the mortgage holder's claim will not be impaired.

The assignment and release between Capitol Indemnity and Norwest Bank stated that Capitol Indemnity was "hereby subrogated to all rights of recovery" against "any person or organization on account of said payments and losses," thus including the Wild Goose Inn.

A.

Capitol Indemnity argues that it is entitled to a set-off of the $347,686 it allegedly paid to the mortgagee from the amount awarded by the jury to Wild Goose Inn. The assignment and release between Capitol Indemnity and Norwest Bank provides for such a recovery in the subrogation clause, which is not ambiguous.

Capitol Indemnity, however, failed to plead or even raise prior to the return of the jury's verdict in the trial court the issue of the subrogation clause. It also presented no evidence during the trial of any payment it made to Norwest Bank. Under controlling precedent, Capitol Indemnity may not obtain a set-off in this action of the amount it claims to have paid in partial satisfaction of the mortgage debt. ***Jansa v. Milwaukee Automobile Mut. Ins. Co.***, 18 Wis.2d 145, 149, 118 N.W.2d 149, 151 (1962), and ***Price v. Hart***, 166 Wis.2d 182, 189–192, 480 N.W.2d 249, 252–253 (Ct. App. 1991), held that a failure to plead or prove insurance policy limits prior to verdict precluded application of those limits to cap the plaintiffs' recoveries. More recently, we concluded that failure to present at trial evidence of an alleged right to subrogation precluded consideration of that issue. ***Chernetski v. American Family Mut. Ins. Co.***, 183 Wis.2d 68, 79–80, 515 N.W.2d 283, 288 (Ct. App. 1994) (alternate holding). The trial court properly declined to allow Capitol Indemnity to set-off against the jury's verdict the amount it claims to have paid Norwest Bank.

B.

Capitol Indemnity argues that it should not be required to pay twelve percent interest on the amount it claims to have paid to Norwest Bank. As noted above, however, Capitol Indemnity is not entitled to a set-off for that amount.

II.

We turn now to the three issues raised on the cross-appeal by Wild Goose Inn. Wild Goose Inn argues that the trial court erred in: (1) granting partial summary judgment to Capitol Indemnity on its counterclaim for actual and punitive damages on its bad faith claim; (2) denying Wild Goose Inn's request for attorney fees; and (3) denying Wild Goose Inn's request for pre-verdict interest. We address these issues *seriatim*.

A.

First, Wild Goose Inn argues that the trial court erred in granting partial summary judgment to Capitol Indemnity on its counterclaim for actual and punitive damages on its bad faith claim.

Summary judgment is used to determine whether there are any disputed issues for trial. ***U.S. Oil Co., Inc. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Appellate courts and trial courts follow the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether the complaint states a claim for relief. ***Id.*** If the complaint states a claim and the answer joins the issue, the court then examines the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. ***Id.*** If the summary judgment materials do not indicate that there is a genuine issue of material fact and if the moving party is entitled to judgment as a matter of law, summary judgment must be entered, § 802.08(2), STATS.

The supreme court has set forth the test for bad faith in an insurance context:

> While we have stated ... that, for proof of bad faith, there must be an absence of a reasonable basis for denial of policy benefits *and* the knowledge or reckless disregard of a reasonable basis for a denial, implicit in that test is our conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured.
>
> Under these tests of the tort of bad faith, an insurance company, however, may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis.

Anderson v. Continental Ins. Co., 85 Wis.2d 675, 693, 271 N.W.2d 368, 377 (1978) (emphasis in original). For punitive damages to be awarded for bad faith, there must be "a showing of an evil intent deserving of punishment, or special ill-will, or wanton disregard of duty, or gross or outrageous conduct." ***State Farm Fire & Casualty Ins. Co. v. Walker***, 157 Wis.2d 459, 465, 459 N.W.2d 605, 608 (Ct. App. 1990).

The deposition testimony of Robert Miller, Vice President in charge of Capitol Indemnity's property and casualty claims, gives the reasons for Capitol Indemnity's denial of coverage for the fire damage.[2] Miller testified:

> [W]e found initially that [Franklin Dohrwardt, co-owner] ended up having a tremendous amount of problems starting his business.... He had problems with his compressors, his refrigerators, the furnace, the health department came in. He had problems with his dishes, the sink and floor.
>
> Because of all these problems, in the spring of 1991 he had to go to more credit. He got another $25,000 in the line of credit, and he was at the end of his credit at that time. In the meantime he was also trying to sell his property, and that didn't work out.
>
> He ran into problems with his taxes. He was overdue in his sales tax, his income tax, quarterly taxes, withholding taxes, property taxes, and then the vise starts getting a little tighter whereby the bank forecloses.... And at this time he's got $390,000 in the mortgage, and his past history is that he missed payments in November and December of 1990, February, March, July, August, and September of '91. And he had also pledged his personal assets as a guarantee for the business loan and because of his

[2] As part of a motion in opposition to Capitol Indemnity's motion for summary judgment, Wild Goose Inn submitted an affidavit containing portions of Miller's deposition testimony, and this affidavit was made part of the record on appeal.

> financial problems, was about to lose his personal assets and the other business that he was running....
>
> He had creditors breathing down his neck. He owed approximately $20,000 to different people that he had incurred debts to. He, at the -- right before the fire, was changing his insurance coverages whereby he was going from $925,000 worth of coverage to $575,000 worth of coverage....
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> ....
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> And then we get into where we put him under an examination under oath, and he gave conflicting testimony to the point where he said that he and his wife had gone to bed immediately after they closed [their other restaurant], and his wife testified that that was not true. He was the last one to leave the premises at the Wild Goose Inn. He and only a few trusted employees were the ones that had keys. The Oakfield Fire Department found no evidence of forcible entry. He knew of no one else that could have or would have had motive to start the fire.

This deposition testimony is corroborated in the record by several other affidavits and depositions. This evidence supports Capitol Indemnity's contention that its liability was "fairly debatable."[3] *See* ***Anderson***, 85 Wis.2d at 693, 271 N.W.2d at 377. Wild Goose Inn has submitted no evidentiary material in opposition to summary judgment showing that the claim was not "fairly debatable." Accordingly, the trial court appropriately granted summary judgment to Capitol Indemnity. *See* ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 291–292, 507 N.W.2d 136, 140 (Ct. App. 1993) (after discovery, to avoid summary judgment, party asserting the claim must make a showing sufficient to establish the essential elements of that party's case).

[3] Whether or not the insurer ultimately prevails in denying coverage is irrelevant to whether it had a good faith basis to assert the defense. ***Mills v. Regent Ins. Co.***, 152 Wis.2d 566, 574, 449 N.W.2d 294, 297 (Ct. App. 1989).

B.

Second, Wild Goose Inn argues that the trial court erred in denying its request for attorney fees under § 806.04, STATS., when Capitol Indemnity was held liable on Wild Goose Inn's claim. The facts central to this issue are undisputed and, therefore, we review *de novo* the trial court's determination. ***Doerr v. Doerr***, 189 Wis.2d 112, 121–122 n.8, 525 N.W.2d 745, 749 n.8 (Ct. App. 1994) (whether facts fulfill a legal standard is a question of law that is reviewed *de novo*).

Wild Goose Inn relies on ***Elliott v. Donahue***, 169 Wis.2d 310, 485 N.W.2d 403 (1992), in support of its claim for attorney fees. In that case, the supreme court held that "sec. 806.04(8), STATS., which recognizes the principles of equity, permits the recovery of reasonable attorney fees incurred by the insured" in a declaratory-judgment action to establish coverage. ***Elliott***, 169 Wis.2d at 314–315, 485 N.W.2d at 404. Wild Goose Inn seeks to extend this principle to all declaratory-judgment suits for coverage. ***Elliott***, however, based the award of fees on the insurer's breach of its contractual obligation to provide a defense to third-party liability claims; in contrast, this case involves first-party property-damage insurance. ***Id.***, 169 Wis.2d at 314–316, 485 N.W.2d at 404–405.

Wisconsin follows the "American Rule," under which parties are generally responsible for their own attorney fees. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis.2d 722, 744, 351 N.W.2d 156, 167–168 (1984). Under this rule, attorney fees cannot be awarded to the prevailing party in the absence of a statute or enforceable contract proving for attorney fees. ***Id.***, 119 Wis.2d at 744, 351 N.W.2d at 167. Neither a statute nor an enforceable contract providing for attorney fees is present here, and we affirm the trial court's denial of attorney fees.

C.

Finally, Wild Goose Inn contends that the trial court erred in denying its request for pre-verdict interest in two respects. First, Wild Goose Inn argues that the trial court should have awarded it five percent pre-verdict

interest running from the date of the fire on December 31, 1992, under ***Benke v. Mukwonago-Vernon Mut. Ins. Co.***, 110 Wis.2d 356, 366–367, 329 N.W.2d 243, 249 (Ct. App. 1982) (pre-verdict interest recoverable only in cases involving liquidated damages or damages susceptible of reliable and reasonably accurate calculation). In its brief, however, Wild Goose Inn provides only a conclusory allegation that the damages were susceptible of such calculation, without citation to the record. It is not the duty of an appellate court to "sift and glean the record ... to find facts to support an alleged error." ***Zintek v. Perchik***, 163 Wis.2d 439, 482–483, 471 N.W.2d 522, 539 (Ct. App. 1991). We decline to address this issue.

Second, Wild Goose Inn contends that it is entitled to twelve percent pre-verdict interest on its entire jury verdict under § 628.46(1), STATS., running from thirty days after Capitol Indemnity received Wild Goose Inn's written proof of loss. The trial court assessed interest from the date of service of the statutory offer of settlement under § 807.01(4), STATS. As noted above, § 628.46(1), STATS., provides that "payment [under the policy] shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment." As noted, the trial court correctly ruled on summary judgment that there was no genuine issue of material fact but that the claim was fairly debatable. Thus, Capitol Indemnity had a good faith basis to deny the claim when it was presented and § 628.46(1)'s authorization of twelve percent interest dating from presentation of the claim is not applicable. We affirm on all issues.

By the Court.—Judgment affirmed.

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