COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2367 **Cir. Ct. No. 2012CV2852**

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

FUN SERVICES OF KANSAS CITY,

PLAINTIFF-APPELLANT,

V.

NATIONAL CASUALTY COMPANY,

DEFENDANT-RESPONDENT,

HERTZ EQUIPMENT RENTAL CORPORATION,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Fun Services of Kansas City sued National Casualty Company in Dane County Circuit Court, seeking payment of the unpaid

amount of a Kansas judgment that incorporated a settlement reached between Fun Services and National Casualty's insured, Hertz Equipment Rental Corporation, without National Casualty's participation. The circuit court dismissed Fun Services's complaint after reviewing cross motions for summary judgment. The court determined that the property damages exclusion in National Casualty's policies precluded coverage.

¶2 We affirm, but on a ground different from that of the circuit court, based on an interpretation of New Jersey law argued by National Casualty and unrefuted by Fun Services.[1] According to that interpretation, one prerequisite for an insurer's liability for the payment of a settlement reached by its insured without the insurer's participation is the insurer's wrongful refusal to defend. National Casualty did not wrongfully refuse to defend in the Kansas action because there is no evidence that Hertz requested a defense in the Kansas action under the policies under which Fun Services seeks payment in this action. Accordingly, having failed to establish a necessary prerequisite to payment, Fun Services fails to establish that it is entitled to payment of the Kansas settlement.

BACKGROUND

¶3 The pertinent facts are not disputed.

¶4 In May 2007, Fun Services, a Kansas corporation, filed a class action complaint in Kansas against Hertz, alleging that Hertz had faxed unsolicited advertisements to Fun Services's facsimile machine on seven dates between

[1] *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) ("[W]e may affirm on grounds different than those relied on by the [circuit] court.").

December 2005 and July 2006, in violation of the Telephone Consumer Privacy Act. The complaint alleged that, "[o]n information and belief, [Hertz] ha[d] sent similar unsolicited facsimile advertisements to at least 37 other recipients."

¶5 Hertz had purchased Media Special Perils Policy Advertiser Coverage from National Casualty, a Wisconsin corporation, for each of the calendar years 2003 through 2007. In October 2007, Hertz sent a "First Report of Loss" to National Casualty's agent, providing notice of the Kansas complaint and referring specifically and only to the Media Special Perils Policies for calendar years 2005 and 2006. National Casualty's agent promptly responded and disclaimed coverage based in part on the "Unsolicited Communication Exclusion" in both the 2005 and 2006 policies. Hertz acknowledged receiving the response disclaiming coverage in late October 2007. Hertz did not again contact National Casualty concerning the Kansas action until May 2012, when Hertz filed an "insurance coverage declaratory judgment suit" against National Casualty and a second insurance company in New Jersey.

¶6 In June 2012, Fun Services and Hertz agreed to the principal terms of settlement of the Kansas action. The terms of settlement provided for a stipulated judgment against Hertz in the total amount of $40,782,000 for faxes sent from 2003 through 2007. The terms of settlement provided that Hertz will pay up to $12 million in partial satisfaction of the judgment, and that the plaintiff class may seek to collect the remaining $28,782,000 of the judgment only from National Casualty.

¶7 In July 2012, Hertz dismissed the New Jersey action and Fun Services filed this action in Dane County, seeking an order declaring that National Casualty had a duty to defend Hertz in the Kansas action and is required to

indemnify and pay any judgment entered in the Kansas action, under Hertz's 2003-2007 National Casualty policies.

¶8 In June 2013, the Kansas court entered a final consent judgment, incorporating the June 2012 terms of the settlement agreement set forth above.

¶9 In April 2014, the circuit court in this action ruled that New Jersey law governs interpretation of the insurance policies and dismissed Fun Services's claims for coverage under the 2005, 2006, and 2007 policies based on the Unsolicited Communication Exclusion in each of those policies. Cross-motions for summary judgment followed, and the court dismissed the remaining claims based on the property damage exclusion in the 2003 and 2004 policies.[2] Fun Services appeals the dismissal of its claims under the 2003 and 2004 policies.

DISCUSSION

¶10 This court reviews summary judgment decisions de novo, applying the same legal standard and methodology employed by the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. 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." ***Kruschke v. City of New Richmond***, 157 Wis. 2d 167, 169, 458 N.W.2d 832 (Ct. App. 1990).

¶11 Although both parties refer to case law from New Jersey, Wisconsin, and other states, Fun Services does not contest the circuit court's ruling that New

[2] The 2003 and 2004 policies do not contain an Unsolicited Communication Exclusion.

Jersey insurance law applies, and National Casualty appears to do the same. Accordingly, as to insurance law, we limit ourselves to New Jersey law.

¶12 The issue, as framed by the parties, is whether National Casualty is responsible under the 2003 and 2004 policies for the payment of the settlement between Fun Services and Hertz, where National Casualty did not participate in the settlement negotiations. *See* ***Griggs v. Bertram***, 443 A.2d 163, 171-72 (N.J. 1982) (addressing an insurer's responsibility where an insured settled a personal injury action without the participation of the insurer). The ***Griggs*** court held:

> "Where an insurer wrongfully refused coverage *and* a defense to its insured, so that the insured is obliged to defend himself in an action later held to be covered by the policy, the insurer is liable for the amount of the judgment obtained against the insured or of the settlement made by him. The only qualifications to this rule are that the amount paid in settlement be reasonable and that the payment be made in good faith."

Id. (quoted sources omitted; emphasis added).

¶13 As we understand National Casualty's argument, the ***Griggs*** test establishes the following five prerequisites: (1) the insurer must have "wrongfully refused" to defend; (2) the insurer must have "wrongfully refused" to provide coverage; (3) the action must later have been held to be covered by the policy; (4) the amount of the settlement must be reasonable; and (5) the amount of the settlement must have been negotiated in good faith. National Casualty argues that

Fun Services fails to establish the first of these prerequisites—that National Casualty wrongfully refused to defend.[3]

¶14 Citing ***Rooney v. West Orange Twp.***, 491 A.2d 23, 26 (N.J. Super Ct. App. Div. 1985) ("There can obviously be no wrongful refusal [to defend] until a proper request had been made and rejected."), National Casualty argues that "absent a request, an insurer does not have a duty to defend," and that it did not wrongfully refuse to defend because Hertz never requested a defense. From what we can discern, National Casualty bases its argument on the following undisputed facts.

¶15 Five months after Fun Services filed the Kansas action against Hertz, Hertz sent a report of loss under the 2005 and 2006 National Casualty policies, and National Casualty denied the claim under those policies. Significantly, National Casualty's denial of the claim included the following:

> We understand that the insured sent various faxes, beginning on December 9, 2005 and continuing to July 20, 2006, to the plaintiffs. The plaintiffs allege that the faxes were unsolicited advertisements in violation of the Telephone Consumer Protection Act. The claimant filed a lawsuit against the insured on or about May 3, 2007 .... If our understanding of the facts is incorrect, please advise us immediately.

[3] National Casualty also argues that the other ***Griggs*** prerequisites are not met, but we need not address those arguments because the failure to meet one prerequisite is dispositive. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

We note that in making some of its arguments, National Casualty "incorporates" portions of its circuit court briefs "[g]iven the word limitations." We admonish counsel that WIS. STAT. § 809.19(1)(e) (2015-16) does not permit the incorporation of arguments made before other courts.

> ....
>
> The carrier's coverage position as described above [denying coverage based in part on the Unsolicited Communication Exclusion in the 2005 and 2006 policies] is based upon information currently available to us. If you believe our information is incomplete or inaccurate or if you have other information that you believe to be relevant, please provide us with the additional information, and we will be pleased to review it. If you disagree with our position, please explain to us the area of disagreement and the basis for your position.

¶16 Hertz acknowledged National Casualty's claim denial in October 2007. The next evidence of communication of any sort with National Casualty about the Kansas action is Hertz's action for declaratory judgment, filed in New Jersey in May 2012, which Hertz dismissed when Fun Services filed this action for declaratory judgment in Wisconsin in July 2012.

¶17 In May 2007, before Hertz acknowledged National Casualty's claim denial in October 2007, Hertz was aware of claims that it sent unsolicited faxes in 2003 and 2004. However, Fun Services points to no evidence that National Casualty was ever informed of those claims, or that Hertz was seeking a defense under the policies covering 2003 and 2004.

¶18 While National Casualty's argument is terse, it is a developed argument. However, Fun Services provides no response, either to the law cited by National Casualty in support of its argument or to the facts as set forth above. More specifically, Fun Services does not address National Casualty's interpretation of ***Griggs*** or ***Rooney***. Rather, Fun Services states only that "the uncontroverted facts ... are that offending faxes w*ere* sent during the operative period." This apparent argument is neither responsive nor developed. Accordingly, we do not consider it further. *See* ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address

undeveloped arguments." (citing ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995)).

¶19 In sum, under the interpretation of the New Jersey case law set forth above, because Fun Services points to no evidence that Hertz requested a defense under the 2003 and 2004 policies, Fun Services fails to establish that National Casualty had a duty to defend under those policies. In the absence of such a duty, National Casualty did not wrongfully refuse to defend under the 2003 and 2004 policies, and, therefore, Fun Services fails to establish that National Casualty is responsible for payment of the Kansas settlement in which National Casualty did not participate.

CONCLUSION

¶20 For the reasons stated, we affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).