IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ETHAN ALLEN and DOROTHEA MARSHALL,	)	No. 67507-9-I
Appellants,	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
STATE FARM FIRE AND CASUALTY COMPANY,	)	
Respondents.	)	FILED: October 8, 2012

Spearman, J. — This is a breach of insurance contract and bad faith case arising out of damage to Dorothea Marshall and Ethan Allen's home, allegedly caused after lightning struck a tree in their backyard. Because reasonable minds could not differ as to the reasonableness of State Farm's investigation, we reject Marshall and Allen's argument that the trial court erred in dismissing the bad faith claim. As for the breach of contract claim, the provision Marshall and Allen contend was breached is not in the record before us, and we decline to review dismissal of that claim. We affirm.

FACTS

On November 21, 2006, lightning hit a tree in Dorothea Marshall and Ethan Allen's backyard, causing damage. Marshall and Allen's home was insured under a

policy issued by State Farm Fire and Casualty. Although the parties provide very little discussion of the provisions of the insurance policy, they apparently agree that State Farm was obligated to pay for damage to the home that resulted from the lightning strike.

On November 29, 2006, State Farm assigned Danielle Kopatich to handle Marshall and Allen's claim. On December 14, 2006, Kopatich inspected the home and interviewed Marshall. Marshall told Kopatich that the lightning strike "shifted the house" and caused "structural damage" to the home. As such, Kopatich indicated a structural engineer would be needed to inspect the nature and extent of the damage.

State Farm hired Kyle Bozick, an engineer with Pacific Engineering, who inspected the home on December 27, 2006. As part of his inspection, Bozick found no evidence of lightning-related damage to the chimney. Marshall was dissatisfied with the inspection because Bozick did not look inside of the chimney. Additionally, Marshall no longer wanted Kopatich to handle the claim. State Farm agreed to provide a new adjuster, and on January 9, 2007, Jackie Jenkins began handling the claim.

Jenkins listened to Marshall's concern regarding the chimney inspection, and asked Bozick to return and inspect the inside of the chimney. Marshall, however, was unhappy that State Farm asked Bozick to follow up on the inspection, and made it clear she did not want him to return a second time. As such, the follow up inspection was assigned to a different engineer, Mark Uchimura of Pacific Engineering.

On January 23, 2007, Uchimura inspected the home again. Jenkins was present. Id. On January 30, 2007, Uchimura provided a report of the inspection. The report showed the following damage occurred as a result of the lightning strike:

- damage to retaining wall;
- damage to several windows;
- detachment of the flexible dryer exhaust from the exterior wall;
- some exacerbation of cracks in firebox brick and mortar joints;
- downward displacement of two roof soffit vent covers;
- damage to tiles on the window sills in the kitchen and master bedroom and bath;
- structurally insignificant cracks in gypsum wall board (referred to as "GWB" in the report); and
- gaps along counter-wall interface in kitchen.

Notably, Uchimura, like Bozick, found no evidence of lightning damage to the chimney. The report indicated that the separation between the chimney and the adjacent gypsum wallboard was not caused by the lightning strike as evidenced by rounded edges of the wallboard, and the dirt and debris inside the separation. Likewise, the report indicated a crack in the home's foundation was the result of "long-term differential settlement" and "not the result of the lightning strike as evidenced by the rounded and dull-colored edges."

In August 2007, State Farm received an estimate from Rainbow Construction for repair of the items identified by Pacific Engineering as lightning related damage. As of August 23, 2007 Rainbow Construction was making repairs. On October 27, 2007 State

Farm issued a check to Marshall and Allen in the amount of $28,006.19 for repair of lightning-related damage to the home.

On November 7, 2007, Jenkins was contacted by Mike Kelty of Greater Northwest Chimney, a chimney repair company retained by Marshall and Allen. Kelty told Jenkins that although the chimney suffered from long-standing wear and tear, there was also "new" damage that "may" have been caused by the lightning strike. On November 18, 2007, Marshall told Jenkins she was very upset with Rainbow Construction and Pacific Engineering, who she felt had failed to find lightning-related damage to the chimney. Marshall said she felt State Farm should pay for all repairs to the chimney.

Around December 28, 2007, Jenkins received a letter from Roger Howson, who indicated he had been hired by Marshall and Allen as an appraiser. State Farm retained John Colvard as its own appraiser.

On January 30, 2008, Colvard told Jenkins that he had met with Howson and received a list of damages that Marshall and Allen claimed were caused by the lightning strike. In a letter of the same date, Marshall and Allen stated, "neither of the engineers contracted by State Farm carried out more than a casual, external, visual survey of the chimney," and that this indicated that "'a complete and comprehensive engineering review of the house has not yet been done.'" Marshall and Allen also stated that a full diagnosis of the damage caused by the lightning still needed to be

done. The next day, on January 31, 2008, Colvard asked Uchimura to review the additional items of alleged lightning-related damage provided by the plaintiffs.

On April 28, 2008, Howson sent a letter to Colvard regarding the status of the appraisal. Howson stated that the appraisal was "at a standstill until several key issues can be decided." Howson indicated that "some of the issues may be coverage questions which would exceed the authority of the Appraisal Panel." He stated that the "critical challenge" was that there were "damages which have neither been proven nor disproven to be consequential to the November 21, 2006 lightning strike."

Mr. Howson noted the insureds chimney repairperson, Mike Kelty, said that "60%-70% of the damage was due to general wear and tear[,]" and that "he was unable and unwilling to say that 30%-40% of the damage was due to the lightning strike." According to Howson, Kelty "was determinedly noncommittal about the cause of that damage." On this basis, Howson argued the claim could not be properly appraised unless State Farm hired an expert qualified specifically to identify and analyze lightning damage:

> The bottom line is that we can't prove that these damages to the electrical system, chimney, structure, outside masonry, etc., were a direct consequence of the lightning strike; [a]nd State Farm can't prove that lightning didn't at least play a role in the damages we're claiming.
>
> This claim requires an expert qualified to identify and analyze lightning damage. The insured have communicated this request to State Farm, and their answer is Mark Uchimura of Pacific Engineer[ing], but he has no experience with lightning claims. I've worked many times with Mark on many different claim situations, and I've found him to be competent, reasonable, and unbiased. The problem in this case is that he is not, by his own admission, experienced in lightning claims. Frankly, neither

> are we.
>
> In order to conduct a thorough investigation of the[] policyholder's claim, State Farm needs to pay for a competent and entirely unbiased lightning expert to inspect the premises, identify all of the existing and potential damages and dangers (consequential to the lightning strike), determine an appropriate remedy, and recommend a scope of repairs which can be acted on by Nordic Services. Anything short of this is a disservice to the policyholders.

Clerk's Papers (CP) at 96. (Emphasis added).

On May 16, 2008, Howson recommended to Jenkins that State Farm hire Paul Way of Case Forensics to investigate possible lightning damage. Jenkins agreed and indicated State Farm would pay for the cost of Case Forensics.

On June 23, 2008, Paul Way performed his inspection of Marshall and Allen's home. Id. On July 11, 2008, Mr. Way forwarded his report to State Farm. The report largely agreed with the previous report from Pacific Engineering, in that much of the damage claimed by Marshall was not lightning-related:

- there was no physical evidence linking ongoing problems with electrical devices in the home to the lightning strike;
- there was no physical evidence that the lightning strike caused damage to the front and rear porch brick fascia;
- there was no physical evidence that the lightning strike caused damage to the basement floor;
- there was no physical evidence that the lightning strike caused damage to the driveway.

CP at 98-101.

In a supplemental report dated August 11, 2008, Way addressed additional claimed lightning-related damages, including the alleged damage to the chimney:

> Ms. Marshall stated that the chimney that runs from the basement foundation upwards through the living room allowed smoke to escape

> into the house through cracks in the brick and mortar. The chimney was repaired prior to my inspection. I noted several small hairline cracks in between the bricks of the chimney but no large holes visible from the exterior. I did not perform any removal of the wall finishes. I saw no evidence of lateral movement of the home around the chimney.
>
> In summary, given the age of the home, all of the damage and/or deterioration to the home could have been long term and I found no evidence that suggested that the home was damaged by lightning except as noted in my previous report. Ms. Marshall's statements were the only indication that the deterioration was related to the lightning strike

CP at 104.

On May 12, 2009, counsel for Marshall and Allen sent Jenkins a letter, stating that Mr. Way performed inadequate inspections and testing. Counsel indicated that Marshall and Allen were in the process of performing their own tests, and that they expected State Farm to pay these expenses. Jenkins responded on May 14, 2009, stating that State Farm conducted a reasonable investigation and further investigation was not warranted. In a letter dated June 12, 2009, counsel for Marshall and Allen stated that the home was being inspected by an "'additional engineer'" on June 18, 2009, and that a report would be forthcoming thereafter. State Farm never received any report.

On January 25, 2010, Marshall and Allen filed suit. The amended complaint alleges State Farm breached the insurance contract in that it "interfered in the appraisal process by directing its appointed appraiser to only appraise that portion of the plaintiffs' loss that State Farm's adjusters agreed was caused by the lightning strike." The amended complaint also alleges one extra-contractual bad faith claim: that

State Farm "neglected or refused to adequately investigate and pay for plaintiffs' losses result[ing] from the lightning strike" in violation of "WAC 284-30-330 thru 380." The amended complaint does not allege State Farm failed to provide a "prompt" review of the claim as is required by WAC 284-30-370.

After the parties engaged in discovery and the trial date was continued, State Farm moved for summary judgment. The motion sought dismissal of the breach of contract claim on grounds that there was an absence of evidence to support an element of the breach of contract claim. Specifically, State Farm argued that Marshall and Allen had failed to provide any evidence of lightning-related damage for which State Farm did not pay. State Farm noted that Marshall and Allen's witness disclosures did not provide summaries of the opinions of their damage experts, and it argued there was no other evidence supporting the allegation of unpaid lightning-related damage.

Marshall and Allen's summary judgment response brief ignored this issue almost entirely. The response simply cited to the witness disclosures attached to a declaration submitted by State Farm. Those disclosures did nothing more than list Mike Kelty and Konrad Koss as witnesses who had knowledge of the damages plaintiffs claim were caused by the lightning strike. Marshall and Allen did not include any reports, declarations, or other testimony from either Kelty or Koss indicating that the damage claimed by plaintiffs was, in fact, caused by the lightning strike. Likewise, Marshall and Allen did not submit a copy of the insurance policy in opposition to summary judgment,

although a copy was attached to a declaration in support of State Farm's motion for summary judgment. The only evidence in the record on this issue is a declaration from Marshall that states, "after the lightning strike, we were unable to have a fire in our fireplace due to smoke intrusion. We did not have this problem before the lightning strike . . . ." CP at 133.

Regarding the bad faith claim, State Farm argued that its investigation was reasonable, in that it acceded to all of Marshall and Allen's requests, including requests for additional inspections and new engineer experts. State Farm also argued the appraisal process was reasonable, noting that it was Marshall and Allen's own appraiser, Roger Howson, who indicated an new expert on lightning damage was necessary to complete an appraisal, and that State Farm hired the expert suggested by Howson.

On this issue, Marshall and Allen's summary judgment response generally argues that State Farm's investigation was not reasonable because State Farm interfered with the appraisal process, in that it "unilaterally restricted the scope of the appraisal to only those items that appeared in a report prepared by the engineering company it had retained[.]" CP at 113. Marshall and Allen did not provide a copy of the provision in the policy regarding the procedure for appraisal. Likewise, Marshall and Allen did not argue that the investigation violated the "promptness" provisions of WAC 284-30-370.

The trial court granted State Farm's motion for summary judgment, dismissing the case. Marshall and Allen appeal.

DISCUSSION

Marshall and Allen argue State Farm's investigation of their claims violated WAC 284-30-370, which requires a "prompt" review of policyholder claims:

> Every insurer must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time. All persons involved in the investigation of a claim must provide reasonable assistance to the insurer in order to facilitate compliance with this provision.

We reject this argument because it was not raised below. We do not consider for the first time on appeal an issue not argued to the trial court. RAP 9.12; Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008). Under RAP 9.12, we will consider "only evidence and issues called to the attention of the trial court" in an appeal of an order on summary judgment. Here, Marshall and Allen did not argue to the trial court that State Farm violated WAC 284-30-370, and as such, this issue was never before the trial court.

Marshall and Allen also argue State Farm's investigation of their claims violated WAC 284-30-330, which requires a "reasonable" investigation into policyholder claims:

> The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:
> . . .

> (4) Refusing to pay claims without conducting a reasonable investigation.

WAC 284-30-330(4). We reject this argument for the reasons described below.

To establish bad faith, an insured is required to show that the insurer's actions were unreasonable, frivolous, or unfounded. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr. Inc., 161 Wn.2d 903, 916, 169 P.3d 1 (2007). An insurer does not act in bad faith where it "acts honestly, bases its decision on adequate information, and does not overemphasize its own interest." Werlinger v. Clarendon Nat'l Ins. Co., 129 Wn. App. 804, 808, 120 P.3d 593 (2005). The determinative question is the reasonableness of the insurer's actions in light of all the facts and circumstances of the case. Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 329-30, 2 P.3d 1029 (2000). Where reasonable minds could not differ as to the reasonableness of the insurer's actions, summary judgment is appropriate. See, Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

In their appellate briefing, Marshall and Allen identify several aspects of the investigation they allege were deficient, including: (1) Kyle Bozick of Pacific Engineering did not inspect the inside of the chimney; (2) Mark Uchimura of Pacific Engineering based his opinion of the damage to the chimney only upon an exterior visual inspection; (3) State Farm was invited to witness repairs made by Mike Kelty of Greater Northwest Chimney, but declined to do so.

Viewed in light of all of the facts and circumstances of this case, Anderson, 101

Wn. App. at 329-30, reasonable minds could not differ as to the reasonableness of State Farm's investigation. Throughout the entire claim process, State Farm acceded to Marshall and Allen's demands, including a request for a new claim adjuster, a request for an additional inspection, a request for a new inspector, and an extension of the time to file suit. State Farm also acceded to Marshall and Allen's own appraiser, Roger Howson, who indicated a new expert with proficiency in identifying lightning damage was necessary to complete an appraisal; State Farm hired the very expert suggested by Howson.

Moreover, Marshall and Allen misunderstand the nature of State Farm's motion. State Farm's motion for summary judgment argued the undisputed evidence confirmed the reasonableness of its investigation, in that any unpaid damage to the home was not caused by the lightning strike. It is true that generally speaking, the moving party on summary judgment bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). However, where a plaintiff "'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" the trial court should grant the motion. Id. at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). A moving defendant may meet the initial burden by "'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's

case.'" Young, 112 Wn.2d at 225 n.1, (quoting Celotex, 477 U.S. at 325).

That is exactly what happened here: State Farm pointed to an absence of evidence showing that the unpaid damage to the home was caused by the lightning strike. Marshall and Allen claim Marshall's declaration was evidence that the damage was caused by lightning. But Marshall's declaration does not purport to establish causation; rather, it simply states "after the lightning strike, we were unable to have a fire in our fireplace due to smoke intrusion. We did not have this problem before the lightning strike . . ." CP at 133. Thus, even viewed in a light most favorable to Marshall and Allen, there was no evidence before the trial court sufficient to establish the claimed damage was caused by the lightning strike. Instead, all of the experts, including the lightning expert suggested by Howson (Paul Way) agreed with State Farm's original expert assessment as to what constituted lightning-related damage. Even Marshall and Allen's chimney expert Mike Kelty was "determinedly noncommittal" about how much of the damage to the chimney was caused by lightning strikes. In short, the trial court did not err in dismissing the bad faith claim.

Marshall and Allen also argue State Farm breached the insurance policy requirement of an independent appraisal to determine the amount of the loss. We reject this argument. As appealing parties, Marshall and Allen had the burden of presenting a record sufficient to allow for our review of the dismissal of their breach of contract claim.

See RAP 9.5, 9.6, and 9.12. After State Farm moved for summary judgment on Marshall and Allen's breach of contract claim, Marshall and Allen declined to put a complete copy of the policy into the record. Thus, although the parties agree the policy contained a provision of some kind regarding appraisal, Marshall and Allen concede that provision is not in the record. We decline to conclude a question of fact exists about the breach of a provision that is not before us.[1]

In sum, the trial court did not err in dismissing the case on summary judgment. Affirmed.

Spearman, J.

WE CONCUR:

Leach, C.J.

Cox, J.

[1] At oral argument, the parties agreed the appraisal language, to the extent it was before the trial court, consisted of a single sentence: "If you [insureds] and we [State Farm] fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal." Even if we were to consider this issue, the trial court did not err in concluding that Marshall and Allen failed to demonstrate a material factual dispute about whether State Farm breached that provision.