COURT OF APPEALS
DECISION
DATED AND RELEASED

February 14, 1996

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. 95-0182

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

MARVIN GAUGER and LOIS GAUGER,

Plaintiffs-Appellants,

v.

THRESHERMEN'S MUTUAL INSURANCE COMPANY,

Defendant-Respondent,

WILLIAM LIGGETT,

Defendant.

APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Marvin and Lois Gauger appeal from a summary judgment in favor of Threshermen's Mutual Insurance Company dismissing their bad faith claim. They argue that a factual issue exists as to whether

Threshermen's handling of their claim for fire damage was reasonable. We conclude that Threshermen's established a fairly debatable basis for the amount of the claim it paid and that no bad faith exists. We affirm the judgment.

The following facts are undisputed. A restaurant owned by the Gaugers was damaged by a fire on May 17, 1991. The Gaugers submitted a claim to Threshermen's, their insurer, on July 1, 1991, for $462,857.90 to repair the fire damage. An additional sworn statement of loss was submitted on January 20, 1992. Marvin gave an examination under oath as required by the policy on April 1, 1992. On April 16, 1992, Threshermen's tendered two checks totaling $80,776.33 for the loss. This bad faith action was commenced on September 10, 1993.

On appeal from a summary judgment, we independently apply the methodology set forth in § 802.08(2), STATS., to the record de novo. ***Garcia v. Regent Ins. Co.***, 167 Wis.2d 287, 294, 481 N.W.2d 660, 663 (Ct. App. 1992). The methodology we apply in summary judgment analysis has been stated often and we need not repeat it. ***In re Cherokee Park Plat***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Garcia***, 167 Wis.2d at 294, 481 N.W.2d at 663.

To establish a claim for bad faith, the insured "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, 376 (1978). The first prong of this test is objective, while the second prong is subjective. ***Weiss v. United Fire and Casualty Co.,*** No. 93-3341, slip op. at 6 (Wis. Dec. 15, 1995). In applying the first prong, it is appropriate to determine whether the insurer properly investigated the claim and whether the results of the investigation were subjected to reasonable evaluation and review. ***Anderson***, 85 Wis.2d at 692, 271 N.W.2d at 377.

The Gaugers argue that a factual issue exists as to whether Threshermen's conducted a neutral and detached investigation with regard to their claim. The affidavits in support of summary judgment establish that

Threshermen's retained the services of John Schweitzer, an independent adjuster, to establish the amount of loss caused by the fire. Schweitzer personally viewed the fire damage to the restaurant, made his own estimate of the extent of damage caused by the fire, and reviewed the documents and repair estimates submitted by the Gaugers to determine a value of the damages. In addition, Schweitzer consulted with a fire restoration contractor for certain items of reconstruction costs and independently verified the prices quoted by the company as reasonable. There is no question that Threshermen's conducted a neutral and detached investigation of the damages caused by the fire.

The Gaugers offered no affidavits countering the legitimacy of Schweitzer's evaluation or his status as an independent adjuster. Rather, their position is that because there was such a large discrepancy between the repair estimates they submitted and that arrived at by Schweitzer, Threshermen's should have hired another independent adjustor to resolve the difference. The mere dispute as to the amount of the loss neither requires the retention of yet another independent adjuster nor creates a factual issue as to the neutrality of Threshermen's handling of the claim.[1] Because Threshermen's had a reasonable basis for the amount of loss paid, it was not required to get a second opinion about the value of the loss. *See* ***Anderson***, 85 Wis.2d at 693, 271 N.W.2d at 377 (an insurance company may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied a claim without a reasonable basis). Indeed, what the Gaugers suggest is akin to some kind of binding arbitration.

It is undisputed that Threshermen's gave the Gaugers opportunity to submit additional information for consideration, even after the claim had been paid. Although Threshermen's was aware that the Gaugers considered the payment to be inadequate, nothing further was submitted to it which questioned the reasonableness of the amount paid. There can be no claim that Threshermen's acted in reckless disregard or indifference to the proofs submitted by the Gaugers. There was no factual dispute which precluded summary judgment dismissing the bad faith claim.

[1] We note that the restoration contractor offered an explanation as to why its repair estimate was in some instances so much lower than that submitted by the Gaugers. The restoration contractor offered its opinion that some of the claimed damages were unrelated to the fire.

By the Court.—Judgment affirmed.

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