COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2811 **Cir. Ct. No. 2011CV406**

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

EAGLE FUEL CELLS-ETC, INC.,

PLAINTIFF-APPELLANT,

V.

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Eagle Fuel Cells-ETC, Inc., appeals an order granting summary judgment to its insurer, Acuity, a Mutual Insurance Company. The circuit court determined Eagle's breach of contract and bad faith claims against Acuity were time barred. It also determined Eagle had failed to make the

preliminary showing of bad faith required to survive a motion for summary judgment. We agree, and therefore affirm.

BACKGROUND

¶2 A fire occurred at Eagle's manufacturing facility in Eagle River, Wisconsin, on March 27, 2009. Both the building and Eagle's equipment were heavily damaged. The fire completely destroyed an autoclave, a piece of equipment Eagle used to manufacture rubber-like fuel bladders for airplanes and race cars.

¶3 Without the autoclave, Eagle could not produce any product. Consequently, it needed to find a replacement autoclave to stay in business. However, Eagle learned it would take at least six months to obtain an autoclave comparable to the one destroyed in the fire. Eagle was able to obtain a used autoclave, but its capacity was twenty-five percent less than that of Eagle's previous model. As a result, Eagle could not produce as much product as it did before the fire, and it sustained a loss of business income.

¶4 Eagle had commercial property insurance through Acuity. Pursuant to the policy, Acuity paid Eagle $129,216.37 for damage to the building and $181,116.73 for damage to personal property. Eagle also submitted a claim to Acuity for $211,216.69 in lost business income under the policy's "Business Income and Extra Expense Coverage Form." Acuity paid Eagle $42,000 toward that claim, but it disputed the amount of Eagle's business income loss.

¶5 Acuity retained the accounting firm Peters & Associates, S.C., to evaluate Eagle's lost business income claim. Peters' first report, dated June 17, 2009, reflected that Eagle had submitted a claim for $64,540.85 in lost business

income. Of that amount, Peters concluded a loss of $14,824.94 was adequately supported by the documentation Eagle provided. Peters stated $37,266.51 of Eagle's claimed losses needed additional support, and $58.15 should be excluded.

¶6 Eagle submitted a revised business income loss computation to Acuity on July 7, 2009. Peters then issued a revised report on August 17, which valued Eagle's claim for lost business income at $49,132.14. After Eagle questioned the accuracy of the August 17 report, Acuity advised Eagle to provide additional information supporting its claim. Eagle then submitted information that it claimed supported a business income loss of $191,035.21.

¶7 Peters issued a third report on October 23, 2009, which valued Eagle's lost business income claim at $58,755. On November 5, Acuity offered Eagle that amount, less the $42,000 it had already paid, as a full and final adjustment of Eagle's claim. Eagle did not accept Acuity's offer, but it indicated on November 10 that it would be willing to settle the claim for $109,432.13. Acuity responded on December 2, indicating it "st[ood] by its evaluation" that Eagle's claim was worth only $58,755. However, "in the interest of good faith and in an effort to avoid further expenses to both parties," Acuity "temporarily increase[d]" its settlement offer to $70,000—$28,000 in new money—for a ten-day period. Eagle did not accept Acuity's increased offer. The parties mediated their dispute on April 14, 2010, but were unable to reach a settlement.

¶8 Eagle filed suit against Acuity on December 29, 2011. The complaint alleged Acuity had breached its contract with Eagle by failing to pay the full amount of Eagle's lost business income claim. It also asserted Acuity was

liable for interest on the unpaid amount, pursuant to WIS. STAT. § 628.46.[1] Acuity moved to dismiss Eagle's claims, arguing they were not filed within the one-year statute of limitations set forth in WIS. STAT. § 631.83(1)(a). Alternatively, Acuity moved for summary judgment, arguing the policy required any legal action against Acuity to be brought "within two years after the date on which the direct physical loss or damage occurred."

¶9 Eagle filed an amended complaint on February 17, 2012, asserting an additional claim for bad faith. Upon the parties' stipulation, the circuit court entered an order bifurcating the bad faith claim and staying proceedings on it until the underlying contract claims[2] were resolved. The court subsequently granted Acuity summary judgment on the contract claims. The court rejected Acuity's argument that Eagle was required to bring the contract claims within the one-year period prescribed by WIS. STAT. § 631.83(1)(a), but it concluded the claims were nevertheless untimely because they were not filed within the two-year limitation period imposed by the policy. Accordingly, the court entered an order for partial dismissal on June 6, 2012.

¶10 Acuity then moved for summary judgment on Eagle's bad faith claim, alleging Eagle had failed to make the preliminary showing of bad faith needed to survive a summary judgment motion. Acuity also argued Eagle's bad faith claim was barred by the two-year statute of limitations for intentional torts.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] We refer to Eagle's breach of contract claim and its statutory interest claim collectively as its contract claims.

See WIS. STAT. § 893.57 (2007-08).[3] The circuit court agreed on both grounds and entered an order granting Acuity summary judgment. Eagle now appeals.

DISCUSSION

¶11 We review a grant of summary judgment independently, using the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

I. Eagle's contract claims

¶12 We must first determine whether the circuit court correctly concluded Eagle's contract claims against Acuity were time barred. Pursuant to WIS. STAT. § 631.83(1)(a), "[a]n action on a fire insurance policy must be commenced within 12 months after the inception of the loss."[4] However, an insurance policy may extend the time for filing suit beyond the one-year period set forth in the statute. *See, e.g.*, ***Wieting Funeral Home of Chilton, Inc. v. Meridian***

[3] WISCONSIN STAT. § 893.57 was amended in 2010 to provide a three-year statute of limitations for intentional torts. *See* 2009 Wis. Act 120, § 1. However, the act that amended the statute provides that the three-year limitation period first applies to injuries occurring on the act's effective date, February 26, 2010. *See* ***id.***, § 2; *see also* WIS. STAT. § 991.11 (Unless otherwise specified, the effective date of an act is the day after its date of publication.). The circuit court concluded Acuity's bad faith, if any, was committed on November 5, 2009. We agree, and we also conclude Eagle's bad faith claim accrued, at the latest, on November 10, 2009. *See infra*, ¶30. Consequently, the 2007-08 version of § 893.57, which sets forth a two-year limitation period, is the applicable statute of limitations for Eagle's bad faith claim. Moreover, Eagle does not contend the circuit court erred by applying the 2007-08 version of the statute.

[4] Eagle's commercial property insurance policy qualifies as a fire insurance policy for purposes of WIS. STAT. § 631.83(1)(a). *See* ***Villa Clement, Inc. v. National Union Fire Ins. Co.***, 120 Wis. 2d 140, 148, 353 N.W.2d 369 (Ct. App. 1984) (holding that the term "fire insurance" in § 631.83(1)(a) is "a generic term which encompasses all types of property indemnity insurance").

Mut. Ins. Co., 2004 WI App 218, ¶9, 277 Wis. 2d 274, 690 N.W.2d 442. Here, the following limitation-of-action provision in Eagle's policy extended the time for filing suit to two years:

> **D. LEGAL ACTION AGAINST US**
>
> No one may bring a legal action against us under this Coverage Part unless:
>
> ….
>
> 2. The action is brought within two years after the date on which the direct physical loss or damage occurred.

¶13 Acuity argues, and the circuit court agreed, that the phrase "the date on which the direct physical loss or damage occurred" means the date of the fire. The fire occurred on March 27, 2009, but Eagle did not file its complaint until December 29, 2011—over two years later. Acuity therefore contends the circuit court correctly concluded Eagle's contract claims were time barred.

¶14 In response, Eagle argues the phrase "the date on which the direct physical loss or damage occurred" is ambiguous when read in conjunction with other policy provisions. Specifically, Eagle observes that the policy's "Business Income and Extra Expense Coverage Form" states that Acuity will provide coverage for the "actual loss of Business Income you sustain due to the necessary *suspension* of your *operations* during the *period of restoration*." Eagle contends this language "allows one conclusion—damages occurring under the Business Income coverage part are not specific to one date, but occur over a period of time." Citing ***Tamminen v. Aetna Casualty & Surety Co.***, 109 Wis. 2d 536, 327 N.W.2d 55 (1982), a medical malpractice case, Eagle then argues that "a claim for continuing damages does not arise until the damages are concluded." (Capitalization omitted.) Eagle therefore contends a reasonable insured would not

interpret the phrase "the date on which the direct physical loss or damage occurred" to mean the date of the fire, because any damages for lost business income would have continued accruing after that date. Instead, Eagle suggests a reasonable insured would conclude the two-year period for filing suit against Acuity did not commence until the insured's operations were restored and it was no longer sustaining a loss of business income.[5]

¶15 Eagle's ambiguity argument is foreclosed by ***Borgen v. Economy Preferred Insurance Co.***, 176 Wis. 2d 498, 500 N.W.2d 419 (Ct. App. 1993). There, the Borgens' policy contained a limitation-of-action provision which stated that no action could be brought against Economy unless it was filed "within one year after the date of the loss." ***Id.*** at 502 (emphasis omitted). The Borgens argued the phrase "after the date of the loss" was ambiguous because another policy provision required them to give Economy notice of the loss, which they could not do until they discovered the loss. ***Id.*** at 503. The Borgens therefore argued it was reasonable to interpret the policy's limitation-of-action provision as requiring them to file suit against Economy within one year after they knew or should have known that the loss occurred. ***Id.***

¶16 We rejected the Borgens' argument, concluding that, "irrespective of Economy's limitation-of-action clause," the statutory language "inception of the loss" was controlling. ***Id.*** at 504. We therefore interpreted the phrase "inception of the loss," as used in WIS. STAT. § 631.83(1)(a), and concluded it "clearly and unambiguously" meant "the date on which the loss occur[ed]." ***Borgen***, 176

[5] Eagle does not suggest a precise date when it believes the two-year period for filing suit against Acuity began to run under the facts of this case.

Wis. 2d at 504-05. We explained that the key word in § 631.83(1)(a) was "inception," which meant "beginning; start; commencement." ***Borgen***, 176 Wis. 2d at 505 (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 966 (2d ed. unabr. 1987)). Consequently, we stated that "the phrase 'inception of the loss' rules out a construction which would postpone the start of the period of limitation until the insured's loss is discovered, or should have been discovered." ***Id.*** We then noted the supreme court had previously interpreted the phrase "inception of the loss" in a fire insurance policy's limitation-of-action provision to mean "the date of the damage suffered by the insured from any peril covered by the policy of insurance." ***Id.*** (quoting ***Riteway Builders, Inc. v. First Nat'l Ins. Co.***, 22 Wis. 2d 418, 423, 126 N.W.2d 24 (1964)). We also observed that the "overwhelming weight of authority" from other jurisdictions supported our conclusion that the phrase "inception of the loss" referred to "the date of injury or damage." ***Id.*** at 506.

¶17 ***Borgen*** therefore teaches that, regardless of the language used in an insurance policy's limitation-of-action provision, the period for filing suit begins to run on the date of "the inception of the loss," as that phrase is used in WIS. STAT. § 631.83(1)(a). Eagle concedes this point in its reply brief, but it argues ***Borgen***'s holding "is not cited with support anywhere else." However, Eagle does not explain why additional support is needed before this court may rely on ***Borgen***. ***Borgen*** is a published court of appeals case, and as such, it is binding precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals is bound by its own prior precedent and may not overrule, modify, or withdraw language from its prior published opinions).

¶18 Consequently, regardless of the language used in Eagle's policy, we must determine whether Eagle filed its complaint within two years of the inception

of the loss. ***Borgen*** explains that inception of the loss means the date the injury or damage occurred, not the date the insured discovered the damage. ***Borgen***, 176 Wis. 2d at 506. We further clarified in ***Bronsteatter & Sons, Inc. v. American Growers Insurance Co.***, 2005 WI App 192, 286 Wis. 2d 782, 703 N.W.2d 757, that a loss may incept before the damage is complete and before the insured knows the full extent of the harm.

¶19 Bronsteatter was a corporation in the business of cash crop farming. ***Id.***, ¶2. In May 2002, its twelve-row corn planter was vandalized, damaging the mechanism that regulated the flow of fertilizer onto two of the rows. ***Id.***, ¶3. Sometime before June 3, 2002, Bronsteatter planted over 1,000 acres of corn with the damaged planter. ***Id.*** It discovered the planter had been vandalized after observing that two rows of every twelve planted were not growing. ***Id.***

¶20 Bronsteatter sued its insurer on June 4, 2003, claiming the insurer breached the parties' contract by refusing to compensate Bronsteatter for its reduced corn yield. ***Id.***, ¶4. The circuit court granted the insurer summary judgment, concluding Bronsteatter's suit was untimely under WIS. STAT. § 631.83(1)(a). ***Bronsteatter***, 286 Wis. 2d 782, ¶5. The court reasoned the inception of the loss occurred when Bronsteatter planted the corn using the vandalized planter, which was more than one year before Bronsteatter filed its lawsuit. ***Id.*** On appeal, Bronsteatter argued the inception of the loss did not occur until it completed its corn harvest in December 2002. ***Id.***, ¶7. We rejected Bronsteatter's argument, reasoning:

> The problem with Bronsteatter's argument is that it ignores the word "inception." While the damage or loss Bronsteatter seeks recovery for is reduced crop yield, we agree with the circuit court that the inception of the loss was the moment the over-fertilized seeds were planted with the vandalized corn planter. That Bronsteatter did not

> know what the actual yield from the field would be, and therefore could not exactly value that loss, does not mean that it was not damaged at the time of planting.

Id., ¶10.

¶21 Applying the reasoning of ***Borgen*** and ***Bronsteatter*** to this case, it is clear that the inception of the loss occurred on March 27, 2009—the date the fire destroyed the autoclave. That is the date of the injury or damage that caused Eagle to sustain a loss of business income covered by the policy. Under ***Bronsteatter***, it makes no difference that Eagle continued to lose business income over a period of time and therefore could not determine the full value of its losses until some unspecified later date. Eagle's loss of business income *began* on the date of the fire, and, as a result, that is the date the inception of the loss occurred. Thus, under the policy, Eagle was required to file its contract claims against Acuity by March 27, 2011. Because Eagle failed to do so, its contract claims are time barred. Accordingly, the circuit court properly granted Acuity summary judgment on the contract claims.

II. Eagle's bad faith claim

A. Preliminary showing of bad faith

¶22 The circuit court also granted Acuity summary judgment on Eagle's bad faith claim, concluding Eagle failed to make the threshold showing of bad faith required to survive a summary judgment motion. On appeal, Eagle argues it made the requisite showing of bad faith by submitting evidence that: (1) the parties had a valid insurance contract; (2) the insurance contract obligated Acuity to compensate Eagle for lost business income; (3) Acuity's expert concluded Eagle sustained $58,755 in lost business income; (4) Acuity accepted its expert's

assessment that $58,755 was the amount of the loss; and (5) Acuity nevertheless paid Eagle only $42,000, leaving an unpaid balance of $16,755. It is Acuity's failure to pay the remaining $16,755 that Eagle contends constitutes bad faith.

¶23 The problem with Eagle's argument is that the mere failure to pay a claim is not bad faith. Instead, to prevail on a bad faith claim, an insured must establish three elements: (1) that the policy's terms obligated the insurer to pay the claim; (2) that the insurer lacked a reasonable basis in law or fact to deny the claim; and (3) that the insurer either knew there was no reasonable basis to deny the claim or acted with reckless disregard for whether such a basis existed. ***Brethorst v. Allstate Prop. & Cas. Ins. Co.***, 2011 WI 41, ¶54, 334 Wis. 2d 23, 798 N.W.2d 467 (citing ARNOLD ANDERSON, WISCONSIN INSURANCE LAW, § 9.4, at 5 (6th ed. 2010)). Stated differently, the insured must prove the insurer's conduct was "objectively unreasonable." ***Farmers Auto. Ins. Ass'n v. Union Pacific Ry. Co.***, 2008 WI App 116, ¶26, 313 Wis. 2d 93, 756 N.W.2d 461.

¶24 In addition, ***Brethorst*** clarified that the insured must make the following threshold showing to proceed with discovery on a bad faith claim:

> [T]he insured may not proceed with discovery on a first-party bad faith claim until it has pleaded a breach of contract by the insurer as part of a separate bad faith claim and satisfied the court that the insured has established such a breach or will be able to prove such a breach in the future. Stated differently, an insured must plead, in part, that she was entitled to payment under the insurance contract and allege facts to show that her claim under the contract was not fairly debatable. To go forward with discovery, these allegations must withstand the insurer's rebuttal.

Id., ¶76 (emphasis omitted). Failure to make this preliminary showing is grounds for summary judgment in favor of the insurer. ***Id.***, ¶79. In other words, to survive a summary judgment motion, the insured must present "some evidence that the

insurer's denial of coverage was unreasonable, or … that coverage was not fairly debatable." *See* ***Ullerich v. Sentry Ins.***, 2012 WI App 127, ¶22, 344 Wis. 2d 708, 824 N.W.2d 876.[6]

¶25 Eagle has failed to make the preliminary showing required by ***Brethorst*** and ***Ullerich***. Eagle does not offer any evidence that Acuity actually denied its claim for lost business income. Eagle does not point to any evidence or develop any argument that Acuity failed to properly evaluate that claim. Eagle does not dispute Acuity's assertion that the total amount of the claim was fairly debatable. Instead, Eagle contends that, once Acuity's expert determined the claim was worth $58,755, Acuity was obligated to pay that amount, and its failure to do so constituted bad faith.

¶26 However, Eagle cannot establish that Acuity breached the parties' insurance contract by failing to pay the balance of the $58,755 valuation. The policy's Business Income and Extra Expense Coverage Form contains the following provision regarding Acuity's obligation to pay claims:

> **4. Loss Payment**
>
> We will pay for covered loss within 30 days after we receive the sworn proof of loss, if you have complied with all the terms of this Coverage Part and:
>
> a. We have reached agreement with you on the amount of loss; or

[6] In ***Brethorst v. Allstate Property & Casualty Insurance Co.***, 2011 WI 41, ¶¶1-2, 334 Wis. 2d 23, 798 N.W.2d 467, the insured pled a first-party bad faith claim against her insurer but did not plead a separate claim for breach of contract. In contrast, Eagle pled claims for both breach of contract and bad faith. However, this court recently held that ***Brethorst***'s "preliminary-showing holding" is not limited to cases in which the insured pled only bad faith. *See* ***Ullerich v. Sentry Ins.***, 2012 WI App 127, ¶¶21-22, 344 Wis. 2d 708, 824 N.W.2d 876.

b. An appraisal award has been made.

It is clear that the parties did not reach an agreement on the amount of the business income loss. Eagle does not argue that Peters' valuation of the loss constitutes an "appraisal award," as that term is used in the policy. As a result, the policy did not impose an obligation on Acuity to pay the balance of the $58,755 valuation. Eagle has therefore failed to establish that Acuity breached the parties' contract by refusing to pay that amount unless Eagle executed a release. To withstand a summary judgment motion on its bad faith claim, an insured must make a threshold showing that the insurer breached the insurance contract. *See* ***Brethorst***, 334 Wis. 2d 23, ¶76.

¶27 Moreover, Eagle does not point to any evidence that Acuity *unreasonably* refused to pay the remaining balance of the $58,755 valuation. There is no evidence Acuity ever refused a demand to pay that amount. Instead, the record shows that Acuity offered to pay the remaining balance of the $58,755 valuation as a full and final adjustment of Eagle's lost business income claim. Eagle rejected Acuity's offer because it believed its claim was worth more than $58,755 and did not want to sign a release. Acuity then increased its settlement offer to $70,000—an amount not supported by Peters' valuation—but Eagle again rejected Acuity's offer because it refused to sign a release. We agree with the circuit court that Acuity's decision to condition payment on the signing of a release was reasonable, given the parties' dispute over the total amount of the loss. As the circuit court put it, "[Acuity] had every right to withhold final payment under circumstances when its liability ha[d] yet to be established by potential litigation." The court properly granted Acuity summary judgment on Eagle's bad faith claim.

B. Statute of limitations

¶28 The circuit court also concluded Eagle's bad faith claim was time barred by WIS. STAT. § 893.57 (2007-08), which states that an action to recover damages for an intentional tort must be brought within two years after the cause of action accrues. *See* ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶16, 249 Wis. 2d 623, 638 N.W.2d 575 (recognizing that § 893.57 is the applicable statute of limitations for the tort of bad faith). We agree with the circuit court's conclusion.

¶29 Eagle contends Acuity committed bad faith when it offered to pay Eagle the value of the loss, as determined by Acuity's expert, but conditioned the payment on Eagle's execution of a release. We have already concluded Acuity's conduct did not constitute bad faith. Even if it did, though, Acuity's act of bad faith would have occurred, at the latest, on November 5, 2009, the date it made the offer.

¶30 A bad faith claim accrues "on the date the injury is discovered or with reasonable diligence should be discovered." *See* ***Hansen v. A.H. Robins, Inc.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983) (adopting discovery rule for "all tort actions other than those already governed by a legislatively created discovery rule"); *see also* ***Davis v. American Family Mut. Ins. Co.***, 212 Wis. 2d 382, 391-92, 569 N.W.2d 64 (Ct. App. 1997) (applying discovery rule to a bad faith claim). Here, Eagle discovered Acuity's alleged bad faith when it received the November 5, 2009 settlement offer, which happened sometime before November 10, 2009. As of November 10, Eagle was aware of all of the circumstances that it now alleges constitute bad faith. That Eagle hoped to achieve a different result through subsequent mediation and negotiation does not change the fact that, as of November 10, Eagle knew Acuity had assessed the

amount of the loss at $58,755 and was refusing to pay that amount without a release. As a result, Eagle's bad faith claim accrued no later than November 10, 2009. To the extent Eagle argues its bad faith claim accrued on some later date[7] because Acuity committed continuing acts of bad faith, we agree with the United States District Court for the Western District of Wisconsin that a bad faith claim accrues when first discovered, not when the injury ends or when the last known injury occurs. *See* ***Ward Mgmt. Co. v. Westport Ins. Corp.***, 598 F. Supp. 2d 923, 927-28 (W.D. Wis. 2009).

¶31 Eagle first asserted its bad faith claim in its amended complaint, which was filed February 17, 2012. Because the bad faith claim arose out of the same transaction, occurrence, or event as the claims asserted in Eagle's original complaint, the bad faith claim relates back to the date the original complaint was filed, December 29, 2011. *See* WIS. STAT. § 802.09(3). However, December 29, 2011 is still more than two years after November 10, 2009—the date Eagle's bad faith claim accrued. Consequently, the circuit court properly concluded Eagle's bad faith claim was time barred, and it properly granted Acuity summary judgment.

By the Court.—Order affirmed.

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

[7] Again, Acuity does not provide us with a precise date when it believes the bad faith claim accrued.