COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1296 **Cir. Ct. No. 2013CV487**

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

BRUCE MULLER AND KAREN MULLER,

PLAINTIFFS-APPELLANTS,

V.

GENERAL CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Bruce and Karen Muller appeal a summary judgment granted in favor of General Casualty Insurance Company concerning whether an automobile insurance policy was in effect on the date of an accident, and whether the Mullers could maintain a bad faith claim. We affirm.

¶2 On April 14, 2013, the Mullers' son was involved in an auto accident that resulted in a property damage claim. General Casualty denied the claim, stating the policy had been effectively cancelled on April 11, due to failure to pay the premium before the cancellation date.

¶3 The Mullers commenced a small claims action against General Casualty, contending the policy was in effect on the date of the accident. Shortly before the scheduled small claims hearing, the Mullers advised the circuit court "we are moving it into upper branch," and the following day they filed a summons and complaint in circuit court.

¶4 General Casualty moved for summary judgment. General Casualty asserted the Mullers were sent a billing statement on March 1, requiring a premium payment by March 22. When no payment was received, a notice of intent to cancel was mailed to the Mullers on March 27, advising their policy would be canceled unless the premium was received at General Casualty's home office prior to the April 11 effective date of cancellation. This notice further advised the Mullers that any payments received after the cancellation date would be applied to any balance owed. A separate notice was mailed to the Mullers on April 11, advising them their policy had been cancelled, and any payment received after that date would be considered late and would not reinstate coverage.

¶5 The Mullers alleged they made a telephonic payment on April 12, 2013. In addition, a claims representative investigated the accident and determined a fair valuation for the Mullers' vehicle and issued a check on April 18. However, the claims representative was advised by underwriting that the policy had been cancelled prior to the accident, and the check was cancelled on April 22.

¶6 The circuit court granted summary judgment, concluding no genuine issue of material fact existed concerning whether the insurance contract was in effect on April 14, 2013, or whether General Casualty lacked any reasonable basis to deny payment given the effective cancellation of the policy on April 11. The Mullers now appeal.

¶7 The Mullers argue the circuit court erroneously exercised its discretion by admitting into evidence an affidavit filed on the date of the summary judgment hearing. The Mullers insist the affidavit was a surprise, and they "had no opportunity to address the Affidavit through further discovery."

¶8 A circuit court has the discretionary authority to "permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." WIS. STAT. § 802.08(3).[1] We are satisfied the court properly exercised its discretion in doing so here.

¶9 As the circuit court correctly recognized, General Casualty offered the affidavit of Kris Gragg at the May 1, 2014 motion hearing to address an argument raised by the Mullers for the first time in their memorandum in opposition to summary judgment filed on April 25, 2014. In that memorandum, the Mullers had claimed General Casualty had not refunded the April 12 premium payment. There was no reason for General Casualty to anticipate the need to address this issue in their moving papers.

[1] References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶10 The Gragg affidavit attached documents including a payment history indicating the Mullers had an outstanding balance of $309.55 for coverage provided through April 11. The April 12 payment of $264 was applied to that balance, leaving $50.55 still owed to General Casualty for coverage already afforded. Quite simply, the Mullers were not entitled to a refund; they still owed on the balance.

¶11 Even if we were to assume the circuit court erroneously exercised its discretion in admitting the Gragg affidavit, any error would be harmless. As the circuit court emphasized more than once, the Gragg affidavit did not reference any evidence the court had not already reviewed in advance of the motion hearing. As the court stated, the affidavit "simply provides the court with some explanation" of the payment history ledger the Mullers had filed in opposition to summary judgment. As such, the affidavit merely assisted the court in understanding an exhibit already submitted into evidence.[2]

¶12 Moreover, to the extent the Mullers argue their counsel was precluded from addressing the affidavit through further discovery, the argument was raised for the first time on appeal. Generally, we do not consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded by statute on other grounds*. A circuit court may order a continuance in order to permit discovery under WIS. STAT. § 802.08(4), but the

[2] We note General Casualty improperly cites ***Bank of America, N.A. v. Raschke***, 349 Wis. 2d 527, 835 N.W.2d 291 (Ct. App. 2013), in contravention of WIS. STAT. RULE 809.23(3)(b), which prohibits citation to unpublished opinions, except for authored opinions issued after July 1, 2009, which may be cited for their persuasive value. Future violations of the rules concerning citation of unpublished opinions may result in sanctions.

Mullers did not request a continuance of the hearing. Indeed, they fail to indicate on appeal what additional evidence they would seek to discover.

¶13 The Mullers also argue the April 12 payment reinstated the insurance contract. However, on March 27 the Mullers were advised in clear and unambiguous terms that "[p]ayments which are received after the Cancellation Effective Date will be applied to any balance owed …. The policies will remain cancelled." In addition, the subsequent notice stated the policy was cancelled and "[p]ayments received after the cancellation are considered late, and will not reinstate the coverage." The evidence established the Mullers owed more than the amount of their April 12 premium payment. The late payment did not reinstate coverage.

¶14 The Mullers insist the actions of General Casualty's claims adjuster assigned to investigate the claim, and the offer to settle the property damage claim, raised genuine issues of material fact regarding waiver of General Casualty's "ability to disclaim the contract." However, there is no indication the adjuster was aware of the coverage issue. He was advised approximately one week later by General Casualty's underwriting department that the settlement checks were being cancelled due to the absence of coverage on the date of the accident.

¶15 In this regard, General Casualty cites ***Nugent v. Slaught***, 2001 WI App 282, 249 Wis. 2d 220, 638 N.W.2d 594, for the holding that when a claims representative acts without knowledge held by other employees of the insurer, such action does not constitute a waiver of the cancellation defense. *See* ***id.***, ¶18. In Nugent, an American Family representative over the course of three years acted as though Slaught had a valid policy in effect at the time of the collision. Among other things, the claims representative negotiated with the plaintiff and paid the

plaintiff's property loss, settled with the plaintiff's passenger and made a full settlement offer to the plaintiff. ***Id.***, ¶7. Ultimately, the parties were unable to fully settle, and suit was commenced. American Family responded to the suit by taking steps to verify coverage and discovered the basis for asserting cancellation. ***Id.***, ¶9.

¶16 The circuit court granted summary judgment to American Family. We agreed with the court's conclusion that American Family did not waive its cancellation defense, based on the general directive that waiver does not occur when one employee mistakenly takes action inconsistent with a policy defense because he or she does not have knowledge held by a different employee of the same company. ***Id.***, ¶18.

¶17 Significantly, the Mullers do not attempt to address ***Nugent***. Arguments not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPS Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, we shall not further address the issue.

¶18 The Mullers also argue in their reply brief that the elements of equitable estoppel are present in this case, based on four prior occasions when General Casualty purportedly reinstated the policy after late payments. Arguments raised for the first time in a reply brief are in violation of WIS. STAT. RULE 809.19 of the Rules of Appellate Procedure and will not be considered. ***Northwest Wholesale Lumber v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

¶19 Finally, the Mullers also fail to discuss the issue of bad faith in their principal brief to this court, and we therefore shall not further address it.[3] However, our conclusion that the insurance contract was effectively cancelled prior to the date of the accident precludes a claim by the Mullers for bad faith in any event.

By the Court.—Judgment affirmed.

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

[3] The Mullers argue in their reply brief that there is a "triable issue of material fact for a jury to determine with respect to bad faith." This argument is undeveloped. Therefore, even were we to address an issue first raised in the reply brief, we would not abandon our neutrality to develop arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).