IN THE COURT OF APPEALS OF IOWA

No. 1-280 / 00-1138
Filed November 16, 2001

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CLERK SUPREME COURT

ROBERT ROSSMANITH,
Plaintiff-Appellant,

vs.

UNION INSURANCE COMPANY OF PROVIDENCE and EMC INSURANCE COMPANIES, a/k/a EMPLOYERS MUTUAL INSURANCE COMPANIES,
Defendants-Appellees.

Appeal from the Iowa District Court for Calhoun County, Curt Wilke, Judge.

Plaintiff homeowner appeals from the district court ruling directing a verdict in favor of defendant insurance company on his cause of action for bad-faith failure to settle an insurance claim. **AFFIRMED.**

Dee Ann Wunschel and Russell S. Wunschel, Carroll, for appellant.

David J. W. Proctor and Sean M. O'Brien of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

Heard by Huitink, P.J., and Miller and Hecht, JJ.

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MILLER, J.

The plaintiff, Robert Rossmanith, appeals from the district court ruling directing a verdict in favor of defendants, Union Insurance Company of Providence and EMC Insurance Companies a/k/a Employers Mutual Insurance Companies, on the part of his lawsuit which claimed bad faith failure to settle an insurance claim. He contends there was sufficient evidence to submit the claim to the jury. We affirm.

I. BACKGROUND FACTS

Robert Rossmanith owned a home that was damaged by a hailstorm on or about May 30, 1998. The storm broke windows and damaged the tile roof. Rossmanith had homeowner's insurance through defendants Union Insurance of Providence and EMC Insurance Companies (EMC). Shortly after the storm Rossmanith contacted a local EMC agent, Renee Stauter, to report the damage and she faxed the claim to EMC. EMC retained GAB Robins (GAB), an independent adjusting company, to review the claim. GAB assigned Bill Agin (Agin) to handle the claim and Agin did an initial inspection of the house and a "scope of damage" estimate on June 9 1998, waiting to do the final estimate of damage until permanent repairs were scheduled. During this initial inspection Agin noticed that Rossmanith had not yet had anything put on the roof to prevent further damage to the interior of the residence or its contents.

Agin advised Rossmanith at that time to make arrangements for temporary repairs on the roof immediately. Rooftop Builders was retained to put a temporary cover on the roof. On June 13, 1998 they removed a large portion of the tiles from the roof and began placing a temporary plastic tarp over the roof.

However, they did not complete the job until June 15, leaving the house exposed to the elements on June 14. On that date it rained approximately two inches, apparently doing additional damage to the interior of the home. After this additional rain Rossmanith moved out of the home on June 14 or 15 and moved in with his girlfriend.

Over the next few weeks Rossmanith received bids from two roofing contractors to do the permanent repairs on the roof. It was ultimately determined Webb Construction, a division of Iowa City Roofing, (Webb) would do the work on the roof. However, Rossmanith spent a considerable period of time discussing and deciding whether he wanted to repair or replace the tile roof or replace it with a less expensive composition shingle roof. By July 15 Webb had removed the tarp cover from the roof and placed a felt cover over the roof in preparation for laying the final tile roof.

Agin conducted a final inspection of the insured premises with Rossmanith on July 22. He wrote a final loss estimate for all of the damage, to the interior, exterior, and personal property, that existed at that time. Included in this estimate was any additional damage that may have occurred during the weekend of June 13 when the roofers failed to cover the roof while making the temporary repairs. During the course of this inspection Rossmanith and Agin went through the house together room by room and Agin prepared an itemized damage report of the building and its contents based on this inspection. Agin discussed his final estimate with Rossmanith and forwarded the estimate to EMC for its

consideration.[1] EMC reviewed the estimate and issued a check to Rossmanith on August 12, 1998 for $57,896, in accordance with the amount of Agin's final estimate for the actual cash value of the loss.[2]

Rossmanith subsequently determined that this payment was not sufficient to cover his damages. In particular he was concerned about a mold and mildew problem that developed in the home. Therefore, Rossmanith retained his own public adjuster, Ron Hetland, who initially inspected the house on September 29, 1998. Hetland subsequently submitted a supplemental claim to EMC in October of 1998 claiming a total of $154,957 in damages to the structure and contents of Rossmanith's house. The great majority of the difference between that claim and the estimate prepared by Agin was for interior damage to the structure and damage to contents, related to mold and damage caused by moisture. EMC had Steve Rehmann, a general adjuster with GAB, review this supplemental claim. Rehmann had some familiarity with Rossmanith's claim because he had visited the premises earlier in the adjustment process to talk with Agin.

Rehmann preliminarily concluded that the additional interior and contents damage presented in the supplemental claim were more likely the result of an extended delay in the re-roofing of the home rather than direct loss from the storm, and would not have occurred had the roofing been done in a timely manner. He based this opinion on his review of Agin's earlier adjustment which

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[1] Agin's estimate did not include the cost for the replacement glass and it was agreed that a bill for the glass would be provided to EMC as a supplemental loss when the cost of the glass was determined.

[2] Agin's total estimate of damages was $77,192 but pursuant to the terms of the insurance policy EMC withheld a "depreciation deduction" of approximately $19,000 until repairs or replacements were completed. This amount was paid to Rossmanith after the completion of the roof in November of 1998.

did not include any mention of a mold problem, the delay in time between Agin's and Hetland's inspections, and the fact the interior had only been covered with a felt layer throughout the entire summer. He felt that the terms of Rossmanith's policy did not provide coverage for such additional damage. Some of the relevant provisions of Rossmanith's homeowner's policy with EMC which Rehmann focused on in his review of the claim included the following:

> **SECTION I - EXCLUSIONS**
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> **1.** We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.
>
> . . . .
>
> **e. Neglect,** meaning neglect of the "insured" to use all reasonable means to save and preserve property at and after the time of loss.
>
> **SECTION I - CONDITIONS**
>
> . . . .
>
> **2. Your Duties After Loss.** In case of a loss to covered property, you must see that the following are done:
>
> . . . .
>
> **d.** Protect the property from further damage. If repairs to the property are required, you must:
>
> **(1)** Make reasonable and necessary repairs to protect the property. . .

Rehmann conferred with EMC regarding his opinion and EMC agreed with his initial conclusion. Then on November 23, 1998 Rehmann informed Hetland that no additional payment on the supplemental claim could be made at that time. However, Rehmann also told Hetland, "Should there be any engineer's reports or

other reports available to us regarding the allegations of mold and moisture" such information should be forwarded to GAB's attention.[3]

Hetland did send Rehmann some additional documentation, including a detailed content report of all of the items in the home and some photographs, however no engineer's reports were ever provided to Rehmann. Rehmann then reviewed all of the information submitted with the supplemental claim, as well as the relevant terms of Rossmanith's policy, and determined that in fact some of the items contained in the supplemental claim were compensable under Rossmanith's policy. Rehmann recommended that EMC pay Rossmanith an additional $7977, but deny the remainder of the supplemental claim because, in his opinion, the additional damage resulted from Rossmanith's failure to protect the property from additional damage after the May 30 storm. EMC agreed with Rehmann's recommendations and Rehmann informed Hetland of this offer on the supplemental claim. Rossmanith rejected the offer and filed suit against EMC for breach of contract and bad faith failure to pay his claim.

The case proceeded to jury trial. At the close of the evidence EMC moved for a directed verdict on the bad faith claim. The trial court sustained the motion for directed verdict on the bad faith claim and submitted the breach of contract claim to the jury. The jury returned a verdict for Rossmanith on the breach of contract claim for $59,190, finding that as a result of the May 30, 1998 storm Rossmanith had suffered that amount of damages in addition to the $77,192 he had previously been paid. EMC paid the judgment. Rossmanith appeals from

[3] The roof was completed around this same time, early November, and Rossmanith requested and received the approximately $19,000 which had been held back by EMC until the completion of the repairs.

the trial court's ruling granting EMC's motion for directed verdict on the bad faith claim.

II. STANDARD OF REVIEW

Our review of rulings granting motions for directed verdict is for correction of errors at law. Iowa R. App. P. 4; *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 640 (Iowa 2000). "When reviewing the ruling, we view the evidence in the same light as the district court to determine whether the evidence generated a jury question." *Balmer*, 604 N.W.2d at 640-41. The evidence must be viewed in the light most favorable to the party against whom the motion was made, regardless of whether it was contradicted. Iowa R. App. P. 14(f)(2); *Reuter v. State Farm Mut. Auto. Ins. Co., Inc.*, 469 N.W.2d 250, 251 (Iowa 1991). In ruling on such motions the trial court must first decide whether the nonmoving party has presented substantial evidence on each element of the claim. *Balmer*, 604 N.W.2d at 641. Evidence is substantial if a jury could reasonably infer a fact from the evidence. *Id.* If the evidence is not substantial, a directed verdict is appropriate. *Id.*

III. MERITS

Rossmanith claims the district court erred in granting EMC's motion for directed verdict on the bad faith claim because the evidence produced at trial showed there was no reasonable basis for EMC to deny his supplemental claim. He notes that the jury found the additional damages to his property were not attributable to any failure on his part to protect the property. He argues Rehmann failed to conduct an investigation before denying the claim and Rehmann had information available to him from EMC's own adjusters

demonstrating the validity of the claim. Rossmanith asserts that had Rehmann investigated he would have learned the delay in protecting and repairing the roof was attributable to EMC.

EMC responds that Rehmann was justified in relying on Agin's initial adjustment and in attributing to Rossmanith the delay in roof repairs and a failure to take other remedial measures to protect the house (and contents) from further damage. EMC also notes that Rossmanith himself acknowledged that the amount of the damage requested by the supplemental claim was excessive. EMC argues it therefore had a reasonable basis for denying Rossmanith's supplemental claim.

For an insured to establish a claim for first party bad faith against an insurer, the "insured 'must show the absence of a reasonable basis for denying benefits of the policy . . .' and that the [insurer] knows or has 'reason to know that its denial is without basis'." *Stahl v. Preston Mut. Ins. Ass'n*, 517 N.W.2d 201, 203 (Iowa 1994); (quoting *Reuter.* 469 N.W.2d at 253). "Where a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Dolan v. Aid Ins Co.*, 431 N.W.2d 790, 794 (Iowa 1988). "In a first party bad faith claim, 'an imperfect investigation, standing alone, is not sufficient cause for recovery if the insurer in fact has an objectively reasonable basis for denying the claim.'" *Sampson v. American Standard Ins. Co.,* 582 N.W.2d 146, 152 (Iowa 1998) (quoting *Reuter,* 469 N.W.2d at 254-55).

Rehmann, as the adjuster retained by EMC, submitted his opinion to EMC on payment or denial of Rossmanith's supplemental claim. Rehmann rendered an opinion that the majority of the additional damage presented in Rossmanith's

supplemental claim resulted from Rossmanith's failure to protect the property from further loss by making reasonable and necessary repairs and therefore that the additional loss was not covered based on the provisions of the insurance policy set forth above.

At trial Rehmann testified as to the basis for his determination and recommendation to EMC. First, he stated that he felt Agin had performed a thorough adjustment for Rossmanith under the initial claim and there had been no mention of any mold problems in the residence in Agin's report. Rehmann believed that if the damage from the May 30 storm had caused the moisture and mold problems later observed by Hetland those problems would have been evident much earlier, and certainly by the time Agin did his final inspection on July 22. However, Hetland's supplemental claim marked the first time anyone had reported a mold problem in the residence. This lead Rehmann to believe there had been additional water penetration and damage subsequent to the storm.

Second, Rehmann testified that he found out in the course of his investigation that the roof still remained covered only by felt at the time of the supplemental claim in October and thus the interior of the house had remained somewhat subject to the elements for the entire summer. Rehmann also had information that the felt cover had sustained wind damage after Agin had done his final inspection. This wind damage required repairs to the felt. The repairs occurred in early October. Rehmann concluded the additional water damage and mold could well have occurred as a result of the damage to the felt roof covering. Furthermore, Hetland never offered an opinion as to causation of the

mold. Rather, he merely stated that the delay in the re-roofing was not on the part of Rossmanith, but instead was due to the unavailability of the tile, which was in the control of Rossmanith's roofing contractor.

Third, Rehmann testified that he had concerns about the content inventory prepared by Hetland because it included cleaning or replacement of each and every item in the house and he had never seen a claim with an inventory of every single item in the home before. In addition, Rehmann felt many of the replacement costs Hetland submitted were excessive and overstated the damage to some items. Even Rossmanith, when informed of the additional amounts Hetland was seeking from EMC, stated to Rehmann that he did not know Hetland's figures were that high, and that he thought the damages were less than that.

Agin testified he warned Rossmanith about the danger of mold and mildew during his final inspection on July 22 and that he told Rossmanith he needed to keep air circulating and the temperature regulated in the house to avoid such problems. Rossmanith testified that he moved out of the residence in early June. He stated he had some dehumidifiers and fans going in the house after he moved out, and that he ran the air conditioner when he was back at the house doing errands or working on the premises. However, he also testified the air conditioner quit shortly after he moved out and that during the month of August it was not running at all. Hetland also testified that upon his initial inspection of the house he recommended additional fans and dehumidifiers for the residence. Therefore, it is undisputed that while Rossmanith initially made some attempt to regulate the temperature and humidity in the house, his efforts were minimal and

largely ended by early August. He ran the air conditioner very little and did not fix it when it quit or take additional steps to regulate the temperature in the home. It is only reasonable to assume Rossmanith knew or should have known that in order to stop the formation of mold and mildew during two of the hottest, most humid months of the year in a home that had sustained water damage he needed to monitor and regulate the temperature and humidity in the home. The record is clear that he was so informed by Agin. It is clear he did not do so.

Based on Rehmann's determination and recommendation EMC denied Rossmanith additional payment for the majority of his supplemental claim. EMC timely moved for a directed verdict on the bad faith claim. The trial court found the issue of payment of the supplemental claim was fairly debatable. The court therefore granted EMC's motion for directed verdict on the bad faith claim.

To summarize, in denying most of Rossmanith's supplemental claim EMC was aware of evidence, which was essentially undisputed at trial, that Agin did a thorough appraisal after Rossmanith's initial claim and found no mold present at that time; Rossmanith did not sufficiently regulate the humidity and temperature in the home once he moved out; reroofing the home with a permanent roof, which was the responsibility of Rossmanith under the terms of the insurance contract, was substantially delayed while Rossmanith decided what type of roof to use; and damage to the felt covering had created the opportunity for additional water to enter the house and cause damage not attributable to the May 30 storm and water entry. These facts, from which EMC reasonably could and did conclude the mold problem which accounted for the majority of the additional

damages requested in the supplemental claim was not caused by the initial storm and water entry, rendered the supplemental claim "fairly debatable."

Furthermore, it does not appear Hetland offered a firm opinion as to the cause of the mold. Rather, he merely asserted that the delay in the roofing was not a result of Rossmanith's personal fault. However, assuming his statements to Rehmann can be construed as sufficiently offering an opinion on causation, it was nevertheless reasonable for EMC to base its opinion concerning the cause of the mold on the opinions of its own experts (Rehmann and Agin) rather than the opinion of Rossmanith's expert (Hetland). An insurance company is not obligated to disregard the opinion of its own expert in favor of the insured's expert. *Sampson*, 582 N.W.2d at 151; *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 97 (1995), *overruled on other grounds by Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775, 784 (Iowa 2000).

Rossmanith alleges Rehmann did not inspect the premises before offering his opinion that the claim should be denied and therefore he had no valid basis for such opinion. We believe the information Rehmann gathered during his investigation was more than sufficient to support his opinion regarding the cause of the mold and his recommendation to EMC and was thus sufficient to support EMC's denial of the majority of the supplemental claim without again inspecting the premises. "In a first party bad faith claim, 'an imperfect investigation, standing alone, is not sufficient cause for recovery if the insurer in fact has an objectively reasonable basis for denying the claim'." *Sampson,* 582 N.W.2d at 152 (quoting *Reuter,* 469 N.W.2d at 254-55). Even assuming this was an "imperfect investigation" we conclude Rehmann had an objectively reasonable

basis for his opinion concerning causation and his recommendation to EMC, and that EMC had an objectively reasonable basis for denying the majority of the supplemental claim.

EMC had objectively reasonable reasons for its denial of the majority of Rossmanith's supplemental claim and all or most all of those reasons are not subject to genuine factual dispute. Because the question of causation concerning the additional damage presented in the supplemental claim was fairly debatable the question of whether the claim was compensable under the terms of the insurance policy, specifically the "Exclusions" and "Conditions" clauses set forth above, was also fairly debatable. The supplemental claim was therefore "fairly debatable" both as a matter of fact and law. We conclude the trial court was correct in sustaining EMC's motion for directed verdict on the bad faith claim.

AFFIRMED.