[Cite as *Barker v. Am. Standard Ins.*, 2004-Ohio-4144.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Carmel O. Barker	Court of Appeals No. WD-03-093
Appellant	Trial Court No. 02-CV-455
v.	
American Standard Ins., et al.	**DECISION AND JUDGMENT ENTRY**
Appellees	Decided: August 6, 2004

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Gerald A. Baker, for appellant.

Michael J. Manahan, for appellees.

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KNEPPER, J.

{¶1} This is an appeal from the judgment of the Wood County Court of Common Pleas which granted summary judgment to appellees, American Standard Insurance ("American Standard"), against appellants, Carmel Barker and Michelle Skeels, with respect to appellants' "bad faith" claim. For the reasons that follow, we affirm the decision of the trial court.

{¶2} Appellants suffered a loss of their vehicle due to fire on January 28, 2001. American Standard investigated the matter between January 29, 2001 and February 8, 2001, at which time it sent appellants a "Reservation of Rights" letter, wherein American

Standard informed appellants that because the loss reported to it may involve fraud, there was a possibility that the loss may not be covered by appellants' policy, but that it would "continue to investigate this claim even though a coverage question exists," and terminated appellants' rental car coverage. During this time period of the investigation, the following observations were made and evidence was discovered.

{¶3} The automobile in question was parked in appellants' driveway in Perrysburg at the time it was allegedly stolen. The front door of appellants' mobile home faced their driveway. According to appellants, the car was stolen between noon and 7:22 p.m. on January 28, 2001, while they were at home. The car was discovered, on fire, at approximately 7:12 p.m. in Toledo.

{¶4} Patrolman Jeffrey Gebhart made a report of the theft. He testified in his deposition that appellants indicated they had not heard anything, such as a breaking window or the car starting, which Gebhart found unusual under the circumstances. Gebhart testified that appellants' neighbor also said that he had not seen or heard anything unusual. Gebhart found it very unusual for a vehicle to be stolen from a residence during the day. Gebhart also found appellants' demeanor, insofar as they did not seem to be bothered by the fact that their car was stolen, to be suspicious, as it was his experience that people were typically quite upset when their car had been stolen.

{¶5} Mark W. Ely, who was with American Standard's Special Investigations Unit, stated in his affidavit that, according to appellants, they had purchased the car approximately eight months prior to the fire. On February 1, 2001, Ely also spoke with

Kevin Irvin, salesman at Ed Schmidt, who told Ely that in December 2000, after having brought the car in on approximately six different occasions for repair, Mr. Barker indicated that he no longer wanted the vehicle and asked the dealership to take it back. Irvin informed Ely that he had told Barker that he owed too much money on the vehicle and would lose a large sum of money if he tried to return it at that time. Irvin indicated that Barker was very upset with the situation.

{¶6} Ely also stated in his affidavit that, on February 1, 2001, he found the vehicle ignition and steering wheel lock pin intact and undamaged, which indicated to him that no physical attack to the steering column or the ignition system of the vehicle had occurred. Ely also stated that the steering wheel did not exhibit any signs of forced turning or physical attack. Ely's observations were confirmed by forensic locksmith, Ryan Ames, who found that the lack of a physical attack to the steering column or ignition system of the vehicle indicated that the vehicle had been driven to the location of the fire with a key. Ely also stated that Ames informed him that the vehicle was equipped with a security system which was virtually impossible to defeat unless the thief was an experienced locksmith who was familiar with motor vehicle systems. Appellants had possession of both sets of keys they had received when they purchased the vehicle and had told Ely that the car did not have a security system.

{¶7} On February 6, 2001, Ely canvassed the area looking for witnesses and found no one who could recall seeing anything unusual that evening or whether appellants' vehicle had been parked in the driveway. Ely stated, however, that two

neighbors informed him that, in the past, they noted that appellants always had their front door open and that they joked about how high appellants' heating bill was because their front door was open all winter. Ely further stated that on both occasions he went to appellants' trailer, the front door was open with appellants sitting in their living room, which overlooked their driveway.

{¶8} Following its issuance of the reservation of rights letter, American Standard continued its investigation. In particular, Ely confirmed through appellants' credit report that appellants were having financial difficulties. Appellants had collection accounts, delinquent accounts and other negative credit information.

{¶9} Additionally, on February 19, 2001, Ames submitted a written report regarding the car's ignition and security system. Ames determined that the steering column and ignition lock system were not physically attacked; the "wafer tumblers" showed no sign of picking or force; the key track was consistent with repeated use of the furnished keys; there was no sign of any freshly cut keys having been used in the lock; and the vehicle was equipped with a factory installed security system which effectively stops three common types of auto theft, including, forced turning of the lock, forced removal of the key cylinder, and hot wiring of the ignition wiring. Based on his examination, Ames stated that, in his professional opinion, one of the two keys furnished with the car was used to start, shift, and steer the vehicle to its final destination.

{¶10} Further, on February 23, 2001, a neighbor in the mobile home park, Winnie Sue Ford, who was a friend of Michelle Skeels, notified American Standard, and

eventually the police, that Skeels had told her in December 2000 that she planned on paying someone to steal her car and blow it up. In a report to the Perrysburg police, Ford indicated that she was present when Skeels received a cell phone call confirming that the car had been burned. Ford also detailed the manner in which the car was taken, as told to her by Skeels. Ford said that Barker went out and started up the car. On his way back to the house, he passed someone and that person got in the car and drove away. Barker's daughter saw this person and told Barker that someone was getting into their car. Barker told her not to worry about it and closed the door. After a few hours, appellants looked outside and said to the kids, "look the car is stolen," and then called the police. Skeels told Ford that the reason she had done this was because she was about to start losing her income and so they had to get rid of one of their cars.

{¶11} Detective Sergeant Roger Wallace, with the Perrysburg police, followed up with Ford's report. Wallace subpoenaed the cell phone records and found an incoming call at 7:15 p.m. from Edwin Carver, a close associate of Barker. Wallace determined that appellants' car had been recovered only two-tenths of a mile from Carver's home.

{¶12} Appellants filed a complaint against American Standard in the Lucas County Court of Common Pleas on March 12, 2001, alleging breach of contract and breach of implied covenant of good faith and fair dealing (also referred to by appellants as "bad faith").

{¶13} Appellants filed an amended complaint on May 8, 2002, adding defendants and causes of action for conversion, of their keys and vehicle, and for defamation.

{¶14} American Standard's motion for partial summary judgment, as to appellants' lack of good faith and fair dealing cause of action, was granted by the Lucas County Court of Common Pleas on June 12, 2002. Thereafter, on or about August 9, 2002, the matter was transferred, due to improper venue, to the Wood County Court of Common Pleas. Appellants sought reconsideration of the award of partial summary judgment that had been entered by the Lucas County Court of Common Pleas. On December 12, 2002, the Wood County Court of Common Pleas denied appellants' motion for reconsideration and affirmed the granting of partial summary judgment on behalf of American Standard. Appellants' remaining causes of action were eventually settled and dismissed on November 3, 2003.

{¶15} Upon the resolution of all causes of action, appellants timely appealed the trial court's granting of summary judgment to American Standard, and raise the following assignments of error:

{¶16} "1. The trial court committed reversible error in granting summary judgment on the issue of bad faith without providing a reason for its decision.

{¶17} "2. The trial court committed reversible error in denying reconsideration to appellant and reversing its ruling on the issue of bad faith inasmuch as the ruling limited

{¶18} the amount of discovery that Appellant was allowed to obtain from Appellee for the underlying claim.

{¶19} "3. The trial court committed reversible error in ruling that Appellant’s case can be distinguished from *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552,

644 N.E.2d 397."

{¶20} In reviewing a motion for summary judgment, an appellate court must apply the same standard of law as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. As such, summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The appellate court is required to do a de novo review, *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, and must independently examine the evidence, without deference to the trial court's determination, to determine if summary judgment is warranted. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, 383.

{¶21} "[A]n insurer has the duty to act in good faith in the handling and payment of the claims of its insured." *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 276. This includes an affirmative duty to conduct an adequate investigation. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 558, cert. denied (1995), 516 U.S. 809. A breach of the duty of good faith will give rise to a cause of action against the insurer. *Hoskins* at 276.

{¶22} An insurer's lack of good faith in the processing of a claim is akin to the concept of "bad faith," and, therefore, is often referred to as such. However, in an insurance context, "the insurer's failure to pay a claim need not involve bad intent or malice to amount to 'bad faith.'" *Stefano v. Commodore Cove E., Ltd.* (2001), 145 Ohio

App.3d 290, 293, citing, *Zoppo*, supra. Rather, "[a]n insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo* at paragraph one of the syllabus. An insurer lacks reasonable justification for denying a claim when its refusal to pay is predicated on an arbitrary or capricious belief that the insured is not entitled to coverage. See *Hoskins*, supra at 277. Summary judgment, however, is appropriately granted to the defendant on a claim of bad faith where the record is devoid of any evidence tending to show a lack of good faith on the part of the defendant. See *Labate v. Natl. City Corp.* (1996), 113 Ohio App.3d 182, 190.

{¶23} In this case, appellants argue that American Standard failed to present any evidence to show that it had a reasonable justification for refusing to pay appellants' claims. In particular, appellants argue that American Standard failed to conduct an adequate investigation prior to determining that they were not entitled to coverage.[1] According to appellants, American Standard got the facts wrong and "did nothing to demonstrate that the facts were correct in this case before making a decision to take coverage away from appellants." Specifically, appellants argue that American Standard never considered the fact that the repairs done to the auto were under warranty and at no cost to appellants. Appellants also argue that, although both sets of keys were with

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[1]We recognize that American Standard did not deny coverage for the damages to appellants' vehicle and only sent a reservations of rights letter informing appellants that additional investigation would be completed. However, to the extent that appellants' rental car payments were terminated, we will consider whether American Standard had reasonable justification for its actions.

appellants and that the forensics lab determined that the auto could not have been moved without a key, American Standard never investigated into the number of keys that may be available for this auto and did not investigate as to the wear of the ignition switch or whether it was operating properly. Appellants assert that based only on the fact that appellants' car had been serviced several times, American Standard decided that appellants were attempting a fraud.

{¶24} Appellants further assert that the evidence presented establishes a genuine issue of material fact regarding whether American Standard breached is duty of good faith dealings and that the trial court erred in granting summary judgment to American Standard on this cause of action. In support of their position, appellants rely on the following cases: *Egan v. Mutual of Omaha Ins. Co.* (1979), 24 Ca.3d 809, 169 Cal. Rptr. 691, 620 P.2d 241; *Furr v. State Farm Mut. Auto Ins. Co.* (1998), 128 Ohio App.3d 607; *Wagner v. Midwestern Indem. Co.* (1998), 83 Ohio St.3d 287; and *Zoppo*, supra. We find, however, that each of these cases are distinguishable on their facts and do not support a finding that genuine issues of material fact exist in this case.

{¶25} In *Egan*, *Furr*, and *Wagner*, the insurance companies conducted almost no investigation or delayed an excessive amount of time before completing their investigations and assessing the insureds' claims. For example, in *Egan*, which is not an Ohio case, the insurance company denied coverage and concluded that Egan was not permanently disabled without ever discussing Egan's medical condition with his physicians and without having Egan examined by an independent doctor. In *Furr*, this

court held that reasonable minds could have concluded differently concerning whether the insurer had a reasonable justification for denying the insured's claim where the insurer delayed 16 months from the time it was informed of the claim before it concluded its investigation and assessed the insured's claim. In *Wagner*, the insurance company delayed a year before proceeding with the insured's claim.

{¶26} In this case, during the ten days prior to terminating rental car coverage, American Standard investigated all known leads and interviewed the insureds, as did the Perrysburg police, personnel at the car dealership, and neighbors. In its investigation, American Standard discovered that: (1) appellants were unhappy with the car, as it had required numerous repairs, and had desired to turn the car in, but would have suffered a financial loss if they had; (2) the steering column and ignition switch had not been tampered with, and could not have been driven to the site of the fire without a key, and that appellants had the two sets of keys that originally came with the car in their possession; (3) contrary to the information provided by appellants, there was a security system on the vehicle; and (4) although appellants said their front door was closed at the time the car would have been stolen, neighbors indicated that appellants always had their front door open in the winter and, in fact, on the two occasions Ely went to appellants' home, the front door was open. Additionally, the continuing investigation conducted by American Standard uncovered more information which implicated appellants in the fire. Accordingly, contrary to the investigations in *Egan*, *Furr*, and *Wagner*, we find that the investigation in this case was not delayed or inadequate. As such, we find that this case is

distinguishable from *Egan*, *Furr*, and *Wagner*.

{¶27} We also find that *Wagner* is distinguishable from this case in other ways as well. In *Wagner*, the court found that a jury question existed where evidence revealed that the insured was cooperative and candid during the investigation of the claim, there was no evidence that he was ever officially questioned or charged with arson, and there was evidence that demonstrated that the fire "could have been accidentally caused by an electrical spark," rather than by arson. In this case, although appellants were cooperative in the investigation, there is no evidence that the car was stolen, except for appellants' bald assertion that it was stolen. To the contrary, the physical evidence suggests that the car, in fact, was not stolen, but was driven to the scene of the fire with one of appellants' own keys, which they had in their possession.

{¶28} We further find that the facts in *Zoppo* are distinguishable from the facts in this case. In *Zoppo*, the insured's bar was destroyed by arson. The insurer denied Zoppo's claim on the basis that it believed he had burned the building himself. In upholding the jury verdict finding lack of good faith, the Ohio Supreme Court held that there was sufficient evidence to establish that the insurer disregarded Zoppo's rights and failed to conduct an adequate investigation. In particular, the court noted that "[t]he record reveals a one-sided inquiry by [the insurer's] investigators as to who was at fault" and that the insurer "did not adequately question suspects or follow up on leads." There were a number of facts in *Zoppo* which weighed against the arson having been done by the insured: (1) there were individuals who had been ousted from the bar and threatened

arson; (2) there had been an attempted arson committed three weeks prior to the arson; (3) two of the ousted individuals took credit for the attempted arson and one said he would be back "to finish the job"; (4) following the actual fire, one of the ousted men told a group of bar patrons that he had set the fire; (5) there was evidence of a break-in and robbery (machines were broken into and one of the windows was broken); and (6) the insured had no financial motive for burning down the bar, as he had made improvements to the bar, would lose money from the arson because he was underinsured, had no debt, and was fighting demolition of the building so he could rebuild the bar. Additionally, the investigators did not thoroughly investigate the arson, insofar as they (1) only focused on Zoppo's inconsistencies regarding his whereabouts on the night of the fire; (2) only did a cursory questioning of the other suspects; (3) failed to locate certain key suspects; and (4) never followed-up by verifying alibis. Finally, the court noted that the insured presented expert testimony of a claims consultant who testified that the insurer's investigation was inadequate and that it was not justified in denying the claim.

{¶29} Unlike the investigation in *Zoppo*, we find that the alleged theft and incineration was thoroughly investigated by American Standard. Additionally, unlike the evidence in *Zoppo*, which supported the insured's position that there were other suspects who may have set the fire, in this case, besides appellants' assertions that the car had been stolen, there was no corroborating evidence of any theft. To the contrary, the physical evidence showed that the car was driven to the location of the fire with a key, and despite the existence of a factory installed security system. Appellants had in their possession

both keys that had been provided with the car when they purchased it. Moreover, the forensic locksmith ascertained that no newly cut keys had been introduced into the key track. Additionally, the investigation uncovered evidence that appellants were unhappy with their car and wanted to turn it back into the dealership, but would have suffered a financial loss if they had done so. With respect to this evidence, appellants assert that the repairs were done under warranty and, therefore, they did not incur out-of-pocket expenses for the repairs. Nevertheless, this assertion does not contradict the fact that Barker was angry about the condition of the car, wanted to turn it back in, and would have suffered a financial loss on the vehicle if he had done so. Accordingly, we find that the facts in this case are not akin to those in *Zoppo*.

{¶30} After weighing the evidence in a light most favorable to appellants, we find that the record is devoid of any evidence tending to show a lack of good faith on behalf of American Standard in investigating appellants' claim. As such, we find that appellants failed to establish that a genuine issue of material fact exists as to whether American Standard had reasonable justification for terminating the rental car coverage and continuing its investigation regarding the loss. No expert testimony was provided and, although appellants argue that American Standard should have investigated further before denying coverage, the fact is that, upon further investigation, the evidence showed that no new key, or freshly cut key, had been introduced into the ignition. We therefore find that American Standard was reasonably justified in its suspicions that one of the two keys in appellants' possession was used to drive the vehicle to Toledo where it was incinerated.

We further find that American Standard's basis for terminating rental car coverage and conducting additional investigation of the claim was not based on an arbitrary or capricious belief that appellants were not entitled to coverage.

{¶31} Accordingly, we find that reasonable minds could only conclude that American Standard was entitled to summary judgment. The trial court therefore properly granted summary judgment to American Standard with respect to appellants' lack of good faith cause of action. Appellants' first assignment of error is therefore found not well-taken.

{¶32} In their second assignment of error, appellants argue that the award of summary judgment limited the amount of discovery that appellants were allowed to obtain from appellee for the underlying claim. Additionally, appellants argue that the trial court abused its authority by weighing the evidence and the credibility of the witnesses without the benefit of cross-examination of the facts.

{¶33} The nature of appellants' second assignment of error is unclear as they do not articulate what evidence they sought to discover, but were unable to obtain. Nevertheless, we find that appellants had the opportunity to conduct discovery and to bring forth evidence to establish a genuine issue of material fact through introduction of Civ.R. 56(E) evidence. Their failure to do so is not grounds for reversal on appeal. Additionally, we find that the trial court had all necessary information before it to grant American Standard's motion for summary judgment. Moreover, having found that no genuine issue of material fact exists and that American Standard is entitled to summary

judgment, we find that appellants' argument that the trial court improperly weighed the evidence and the credibility of the witnesses is unfounded. Appellants' second assignment of error is therefore found not well-taken.

{¶34} In their third assignment of error, appellants argue that the trial court committed reversible error in ruling that appellants' case was distinguishable from *Zoppo*, 71 Ohio St.3d 552. Based on our determination, with respect to appellants' first assignment of error, that *Zoppo* is distinguishable from the facts of this case, we find appellants' third assignment of error not well-taken.

{¶35} On consideration whereof, the court finds that summary judgment was correctly granted to American Standard with respect to appellants' "bad faith" cause of action. The judgment of the Wood County Court of Common Pleas is therefore affirmed. Pursuant to App.R. 24, costs are assessed to appellants.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. ____________________ JUDGE

Richard W. Knepper, J. ____________________ JUDGE

Arlene Singer, J. ____________________ JUDGE

CONCUR.