DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

GERALD WILLIAMS,

Appellant,

v.

STATE FARM FLORIDA INSURANCE COMPANY,

Appellee.

No. 2D20-2092

March 16, 2022

Appeal from the Circuit Court for Hillsborough County; Emmett Lamar Battles, Judge.

George A. Vaka and Nancy A. Lauten of Vaka Law Group, Tampa; and Kelly L. Kubiak of Merlin Law Group, Tampa, for Appellant.

Paul L. Nettleton and Jeffrey A. Cohen of Carlton Fields, Miami, for Appellee.

SLEET, Judge.

Gerald Williams appeals the trial court's final summary judgment entered in favor of State Farm Florida Insurance

Company in his first-party bad faith action. Because State Farm's invocation of the appraisal process and its payment of the appraisal award after the expiration of the sixty-day cure period on Williams' civil remedy notice (CRN) did not cure the alleged bad faith, we reverse.

Williams owned a home insured by State Farm. In July 2009, while the policy was in effect, lightning struck Williams' home and caused significant property damage throughout. After Williams filed a claim of loss, State Farm acknowledged coverage, determined the amount of loss, and made several payments over a span of eight years. In 2017, Williams disputed the amount of loss and State Farm invoked the appraisal provision under the policy to determine the amount to be paid to repair the property. On May 4, 2018, while the appraisal process was still ongoing, Williams filed the statutorily required CRN, providing State Farm with notice of his intent to pursue a bad faith claim against State Farm. *See generally* § 624.155(3)(a), Fla. Stat. (2018). The appraisal award, which set the amount of the loss at $504,913.11, was ultimately issued on December 18, 2018. On February 15, 2019, State Farm paid the full remaining amount due.

On October 27, 2019, Williams filed a first-party bad faith action against State Farm. In response, State Farm filed a motion requesting that the court either dismiss the complaint or enter final summary judgment and argued (1) that the sixty-day cure period under section 624.155 was tolled pending the filing of the appraisal award because there was no amount owed under the policy to Williams at the time the CRN was filed, (2) the payment of the appraisal award within sixty days of the award's issuance cured the alleged bad faith allegations, and (3) Williams' CRN was legally deficient. The trial court held a hearing on the motion and entered an order granting final summary judgment based upon State Farm's first argument.

We review a trial court's ruling on a motion for summary judgment de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "This court also employs the de novo standard when interpreting a statute or an insurance policy." *Ganzemuller v. Omega Ins. Co.*, 244 So. 3d 1189, 1190 (Fla. 2d DCA 2018).

On appeal, Williams argues that the trial court erred in concluding that State Farm timely paid the appraisal award

pursuant to the terms of the insurance policy and that the CRN was cured. We agree.

This court previously addressed this identical issue in *Fortune v. First Protective Insurance Co.*, 302 So. 3d 485, 490 (Fla. 2d DCA 2020), and held that an insurer's statutorily required sixty-day response to the CRN is not dependent on the determination of damages following appraisal and that "section 624.155(3)(d) does not toll the cure period until an appraisal is completed." State Farm's present assertion that its sixty-day response to the CRN was tolled because a condition precedent to payment had not been fulfilled is simply another iteration of the same argument, particularly because State Farm's asserted "condition precedent to payment" is the completion of the appraisal process. Once again, State Farm conflates its contractual duty to ultimately pay the amounts due under the policy with its statutory duty to act reasonably and in good faith in evaluating the claim prior to the determination of damages.

With respect to paying claims, insurers have two independent duties, one contractual and one statutory. First, they have a contractual duty to "timely evaluate and pay benefits owed on the

insurance policy." *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275 (Fla. 2000); *see also Zaleski v. State Farm Fla. Ins. Co.*, 315 So. 3d 7, 12 (Fla. 4th DCA 2021) ("[W]hen an insurer receives a claim, it has an independent duty to evaluate the claim in advance of a determination of damages and take timely, independent action."). This includes determining coverage, liability, and the amounts due under the policy. Second, they have a statutory duty to act reasonably and in good faith in evaluating the claim. *See* § 624.155(1). "Thus, the focus in a bad faith case is not whether the insurer ultimately paid the amounts due under the policy, but whether it acted reasonably in evaluating the claim prior to the determination of damages." *Zaleski*, 315 So. 3d at 12 (citing *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018)). While the contractual and statutory duties are related, they each have distinct procedures.

As to the contractual duty, generally the terms and conditions of insurance policies dictate the process that the parties follow before an insurer pays a claim. This can include, as is seen here, the right to invoke appraisal if the parties disagree on the amount of loss.

As to the statutory duty, if a person has been damaged by an insurer's failure to comply with its duty to act in good faith while evaluating the claim, he or she may bring a civil action against the insurer. § 624.155(1). However, as a condition precedent to bringing such an action, the insurer must be given the CRN, which puts it on notice of the violation. § 624.155(3)(a). Once the CRN is filed, the insurer has sixty days to either pay the damages resulting from such violation or correct the circumstances giving rise to the violation. § 624.155(3)(c). Section 624.155 does not include any language modifying or creating an exception to the mandatory sixty-day cure period when an insurer invokes appraisal or fails to pay damages because a condition precedent to payment under the policy has not been fulfilled.[1]

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[1] In 2019, the legislature amended section 624.155 to add the new subsection (3)(f) which states that "[a] notice required under this subsection may not be filed within 60 days after appraisal is invoked by any party in a residential property insurance claim." Although the subsection is not applicable here, it nonetheless further reinforces Williams' position that seeking an appraisal is not a cure to a failure to attempt to timely settle a claim in good faith. The legislature is well versed in insurance law and has not seen fit to toll the sixty-day response for any reason.

Here, State Farm argues that the sixty-day cure period was tolled until the appraisal process was completed and that the appraisal award determined the amount owed under the policy. However, the amount owed under the policy relates back to State Farm's contractual duty to evaluate and pay benefits owed, not its statutory duty to act reasonably and in good faith. State Farm's policy language that provides that no payment is due until a condition precedent to payment has been fulfilled does not supplant the clear language of section 624.155(3)(c), which establishes the insurer's statutory obligation to pay the damages or correct the circumstances giving rise to the violation within sixty days after the insurer is given notice. "[A]n appraisal is not a condition precedent to the insurer fulfilling its obligation to fairly evaluate the claim and to either deny coverage or to offer an appropriate amount based on that fair evaluation." *Fortune*, 302 So. 3d at 490. Rather, the appraisal, along with the filing of the CRN, affects the ripeness of a bad faith action. *Landers v. State Farm Fla. Ins. Co.*, 234 So. 3d 856, 860 (Fla. 5th DCA 2018) ("Once the appraisal process is complete, and a legally sufficient CRN had previously been provided, the conditions precedent to filing a statutory bad-faith

claim are met."); *see also Zaleski*, 315 So. 3d at 10-11 ("[A] statutory bad faith claim under section 624.155 is ripe for litigation when there has been (1) a determination of the insurer's liability for coverage; (2) a determination of the extent of the insured's damages; and (3) the required notice is filed pursuant to section 624.155(3)(a)." (alteration in original) (quoting *Demase v. State Farm Fla. Ins. Co.*, 239 So. 3d 218, 221 (Fla. 5th DCA 2018))).

In *Vest*, the Florida Supreme Court cogently articulated that the insurer's evaluation of a claim for purposes of bad faith is not dependent on the determination of damages:

> As in the present case, there is no statutory requirement which prevents the insured from sending the statutory notice before there is a determination of liability or damages. Nor is the insurer's appropriate response to that notice dependant [sic] on such a determination. The insurer's appropriate response is based upon the insurer's good-faith evaluation of what is owed on the insurance contract. What is owed on the contract is in turn governed by whether all conditions precedent for payment contained within the policy have been met. *An insurer, however, must evaluate a claim based upon proof of loss required by the policy and its expertise in advance of a determination by a court or arbitration.*

753 So. 2d at 1275-76 (emphasis added).

Furthermore, in *Zaleski*, the Fourth District followed this court's reasoning in *Fortune* and rejected State Farm's similar

argument that because the parties did not agree on the amount of the loss, the appraisal was a condition precedent to State Farm's obligation to make a payment under the policy, thus tolling the sixty-day cure period under section 624.155.

> We agree with *Fortune* and hold that "[t]he language of section 624.155(3)(d) does not toll the cure period until an appraisal is completed." 302 So. 3d at 490. The appraisal award is not a condition precedent to State Farm's obligation to pay the Homeowners a fair amount due under the policy. To allow the sixty-day cure period to toll at the invocation of the appraisal process would allow insurers to cause delay or otherwise act in bad faith while escaping liability as long as it makes payment within the sixty-day time period of the appraisal award. This would negate and frustrate the purpose of the statute. *See Landers*, 234 So. 3d at 859 ("[T]he purpose of the CRN is to facilitate and encourage good-faith efforts to timely settle claims before litigation, not to vindicate continuing efforts to delay." (internal citation omitted)).

315 So. 3d at 12.

As such, State Farm's response to Williams' CRN was not dependent on the ultimate determination of the amount of loss in accordance with the condition precedent to payment of completing the appraisal process which was contained within State Farm's policy. Consistent with *Fortune* and *Zaleski*, we hold that State Farm's invocation of the appraisal process and payment of the

appraisal award after the cure period did not, as a matter of law, cure the alleged bad faith claim. State Farm's policy language withholding payment until the fulfillment of a condition precedent to payment does not absolve State Farm of its statutory duty to comply with section 624.155. "Whether State Farm's initial evaluation of the claim and actions during the sixty-day cure period were reasonable remains an issue of fact for a jury to resolve." *Zaleski*, 315 So. 3d at 13.

State Farm also argues in the alternative that this court should affirm the summary judgment because Williams' CRN was legally deficient. However, the trial court did not rule on the issue and made no oral or written findings concerning the sufficiency of the CRN. Therefore, we decline to reach the issue. S*ee Landers v. State Farm Fla. Ins. Co.*, 234 So. 3d 856, 858 n.5 (Fla. 5th DCA 2018) ("State Farm argues alternatively that the CRN was invalid because it failed to comply with the bad-faith statute. Because we cannot determine whether the court ruled on this basis, we decline to address this issue for the first time on appeal."); *Maynard v. Fla. Bd. of Educ.*, 998 So. 2d 1201, 1207 (Fla. 2d DCA 2009) ("Since the trial court

has never addressed this question, we will not do so for the first time on appeal."); *Gearity v. Stuart*, 324 So. 3d 560, 561 (Fla. 5th DCA 2021) ("We also reject the Appellees' alternative basis for affirmance because the trial court never reached the merits of Appellant's section 57.105 motion. We 'cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so.' " (quoting *Featured Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011))); *Kokhan v. Auto Club Ins. Co. of Fla.*, 297 So. 3d 570, 576 (Fla. 4th DCA 2020) ("As for the policy's 'wear and tear' exclusion, the circuit court did not rule on that exclusion, so the homeowners' argument that the 'wear and tear' exclusion did not apply is not ripe for our review.").

Accordingly, we reverse the final summary judgment entered in favor of State Farm and remand for further proceedings.

Reversed and remanded.

ATKINSON and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.