*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2004-500

APRIL TERM, 2005

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| Christopher Borie and Diana Morin Borie | } | APPEALED FROM: |
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| | } | |
| v. | } | Chittenden Superior Court |
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| National Grange Mutual Insurance Company | } | |
| | } | DOCKET NO. S1557-03 CnC |
| | | Trial Judge: Matthew I. Katz |

In the above-entitled cause, the Clerk will enter:

In this insurance coverage dispute, plaintiffs Christopher and Diana Borie appeal from a summary judgment entered in favor of National Grange Mutual Insurance Company on the Bories' complaint, alleging breach of the covenant of good faith and seeking declaratory and monetary relief. We reverse and remand.

We review a summary judgment de novo and employ the same standard used by the trial court. Smith v. Nationwide Mut. Ins. Co., 2003 VT 61, ¶ 8, 175 Vt. 355. Summary judgment is proper only when the record shows no genuine dispute over the material facts and the law entitles any party to judgment. Id.; V.R.C.P. 56(c)(3). When reviewing the motion for summary judgment, we must give the nonmoving party the benefit of all reasonable doubts and inferences. Smith, 2003 VT 61, ¶ 8. Viewed under this standard, the record reveals the following facts.

The Bories are regular shoppers on e-Bay, a well-known Internet auction site. Diana Borie describes herself as an "addict" of the site, and over the years the couple has purchased numerous pieces of jewelry from e-Bay. The Bories keep some pieces of jewelry in a safety deposit box at the Vermont National Bank, including a large emerald and diamond ring that Diana Borie purchased through an e-Bay auction in 2003. The loss of that ring gave rise to the present dispute.

The Bories had plans to attend a wedding in Bennington over the weekend of June 21-22, 2003. Before leaving home for the weekend, the couple removed the ring from the safety deposit box so that Diana could wear it to the wedding. Because the ring was large, Diana would wear it on her middle finger, which she did on the day of the wedding. At the reception, Diana had to continually secure the ring on her finger because it would slip down towards her knuckle. At one point, after returning to the table from the dance floor, she noticed that the ring was gone. She and Christopher immediately began looking for it at the table where they were seated. They also searched the dance floor and other areas Diana knew she had been that evening.

The Bories did not find the ring that evening, but they gave the reception hall manager a description of it, along with their address and telephone number in the event that the ring was found. Diana called the hall several times over the next few days to find out if the ring had been found. Annoyed with her persistence, the hall's manager told Diana to stop calling. Convinced they would not find the ring, the Bories gave notice of the loss to National Grange by way of a sworn proof of loss statement.

On July 7, 2003, National Grange sent a private investigator to the Bories' home to take recorded statements from them separately. The parties dispute whether the investigator administered an oath to the Bories before they answered his questions. In any event, the investigator questioned Christopher and Diana separately, asking about the ring's purchase, its value, and the circumstances of the loss. Neither Diana nor Christopher could remember how much they paid for the ring, and each gave different estimate of the purchase price. Diana told the investigator about the safety deposit box and their practice of storing the ring there, and Christopher identified the bank at which the box was located. Both assumed they had thrown away the receipt for the ring and could not remember the name of the seller. Each told the investigator that when they insured the ring, Christopher provided National Grange's agent with a copy of an appraisal that came with the ring. The following day, Diana notified National Grange that she bought the ring for $1,708.01. She also sent the company a number of photographs depicting the ring on her finger.

On July 10, 2003, Diana sent National Grange a copy of the appraisal, which put the ring's replacement value at $15,000. She also sent two additional estimates she obtained from local jewelers, ranging from $13,000 to $16,203. It is unclear what occurred next, but it appears that National Grange offered $1,780.01 to settle the claim. The Bories rejected the offer because, although they paid only $1,780.01 for the ring, they claimed that their appraisals showed that the ring's replacement value was significantly higher.

On September 9, 2003, a Massachusetts law firm, Smith & Brink, wrote to the Bories stating that the firm represented National Grange. The letter gave notice that National Grange wanted the Bories to submit to an examination under oath as their insurance policy required. Smith & Brink also requested that the couple bring with them a long list of financial documents, including tax returns; credit reports; mortgage documents; bank statements; cancelled checks; location of all safety deposit boxes; net worth statements; list of stocks, bonds, trusts interests, and real estate holdings; all loan applications; monthly credit card statements; all insurance claims they filed, whether personal or business; and tax liens. In some cases, Smith & Brink wanted documents dating as far back as 1998. The examinations were scheduled to take place at a local Burlington law firm, and Smith & Brink explained that the date could be changed to allow the Bories time to gather the requested documents.

At some point during the back and forth between the parties, the Bories contacted the Department of Banking and Insurance to obtain information about their rights under their homeowners policy with National Grange. The record shows that at least one inquiry related to a representative of National Grange insisting that Diana give the company her e-Bay log-in identification and password. When she refused, the representative directed her to provide the company with a copy of every e-Bay purchase she had ever made. The Bories decided to contact counsel for advice on how to handle the requests for information because they believed National Grange wanted more information than was reasonably related to their claim, and they felt that the company was invading their privacy and trying to avoid paying their claim.

Smith & Brink wrote the Bories again in October. The letter notified the couple that National Grange could not waive the examination-under-oath provision in the policy "due to the circumstances of [their] claim," and offered to reschedule it for a more convenient time. Diana wrote back via email on October 21. She explained that she and her husband were concerned about the breadth of the document requests and that they would submit to an exam after the parties reached an agreement on the requests. She and Christopher believed their prior statements to the investigator were under oath and that they had already complied with the insurance contract in that regard. As to the documents, Diana explained that they were willing to turn over any document relevant to the claim but nothing more out of privacy concerns.

On November 5, 2003, Smith & Brink gave written notice that National Grange believed the Bories had not complied with the terms of their insurance policy by not submitting to an exam under oath and by refusing to provide the documents the attorneys had requested. On November 14, 2003, the Bories' lawyer wrote to Smith & Brink. In the letter, counsel assured Smith & Brink that the Bories intended to cooperate in National Grange's investigation. But, counsel explained, many of the documents Smith & Brink asked for were irrelevant and the request was overly broad. He offered to provide certain documents, asked to reschedule the examinations, and requested a copy of the recorded statements the Bories gave to the investigator. By letter dated December 8, 2003, Smith & Brink notified the Bories, through counsel, that the exams they noticed for December were cancelled. Smith & Brink agreed to reschedule them at

a mutually convenient time.

By December 12, the Bories still had not received a copy of their July statements. Counsel wrote Smith & Brink about the matter. Again, counsel asked for the transcripts so that the Bories could read and sign them in accordance with the insurance policy. The letter also notified Smith & Brink that the Bories were gathering all documents that were "arguably" relevant to their claim. On or about December 19, the Bories filed the complaint at issue here, seeking to determine their rights under the policy. They also claimed that National Grange had breached the covenant of good faith by, among other things, engaging in conduct intended to harass, annoy, and otherwise discourage the Bories from pursuing their claim. Counsel mailed the summons and complaint to Smith & Brink with the answers to the questions the firm originally posed in the September 9, 2003 letter. The Bories also sent many of the documents Smith & Brink requested. National Grange answered the complaint on January 22, 2004, and it moved for summary judgment in May.

The May motion for summary judgment claimed that the Bories failed to cooperate with National Grange by not submitting to an exam under oath. The trial court agreed, and entered judgment accordingly. In ruling on the motion, the court erroneously construed the facts in the light most favorable to National Grange, essentially finding that National Grange's broad inquiries into the Bories' present and past personal finances were justifiable because the Bories' claim of loss was suspicious. And, because the company's investigation was justified, the Bories' refusal to accede to the company's demands was, as a matter of law, a failure to cooperate entitling National Grange to judgment. We disagree.

"[A]n insurer and an insured owe to each other a duty of good faith and fidelity" when discharging their respective duties under an insurance contract. Id. ¶ 19. The insured is obligated to cooperate in good faith with the insurer so the claim can be investigated while the information is fresh and to allow the insurer to determine its obligations and protect itself from fraudulent claims. Id. ¶ 12. If the insured fails to cooperate, the insurer may be relieved of its obligations under the contract. Id. ¶ 10. In this case, National Grange contends that the Bories failed to cooperate with two contractual provisions. The first requires the insured to provide National Grange "with records and documents [it] request[s] and permit [it] to make copies." It also permits the company to require the insured to "[s]ubmit to an examination under oath, while not in the presence of any other 'insured,' and sign the same." National Grange argues that the law clearly excuses it from paying on the Bories' claim because they refused to provide documents and submit to the sworn examination irrespective of any prejudice to the company.

In a case nearly identical to this one, the Indiana Court of Appeals reversed a summary judgment in favor of the insurer, concluding that an insured's non-cooperation must be wilful and intentional and must prejudice the insurer before the insurer may avoid its policy obligations. Morris v. Economy Fire & Cas. Co., 815 N.E.2d 129, 135-36 (Ind. Ct. App. 2004). In Morris, the insureds filed a claim for property stolen from a storage facility. At first the insureds claimed property valued at only $15,000. Subsequently, they realized that a number of expensive tools had been taken and increased their claim to $38,000. Like the Bories, the insureds in Morris gave separate recorded statements to an investigator working for the insurance company. The insurer in Morris asked the insureds for the same information that National Grange requested of the Bories in this case. The insureds in Morris secured legal counsel and, like the Bories' counsel here, counsel asked the insurer to provide copies of the insureds' prior statements before the insureds would submit to another examination under oath. The Morris insureds also objected to the breadth of the document requests, having already given their insurer a number of documents related directly to their loss.

The Indiana Court of Appeals agreed with the insureds that the insurer's demands were unreasonable. Id. at 135. Like the Bories here, the insureds in Morris were seeking judicial relief from document requests they reasonably believed were out of bounds. In the court's words:

> Particularly, the record indicates that the Morrises filed formal objections to several of the requests made by Economy, as they believed the demand was unfair, burdensome and oppressive, and also constituted an invasion of the Morrises' privacy. We cannot say that the Morrises' actions indicated a willful and intentional refusal to cooperate. Instead, the evidence indicates only the Morrises' objection to the requested documentation, and does not establish the Morrises' refusal to cooperate. Furthermore, Economy must also establish that, as a matter of law, its request was reasonable. This Economy has failed to do. Consequently, we find that

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a genuine issue of material fact exists regarding this issue.

Id. The same genuine issue of material fact exists in this case. None of the authorities National Grange cites in support of the judgment below persuades us otherwise.

Reversed and remanded for further proceedings consistent with this decision.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice