Appeal No. 2008AP1303 **Cir. Ct. No. 2006CV419**

WISCONSIN COURT OF APPEALS
DISTRICT III

ROEHL TRANSPORT, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

BARBARA REILLY, BRIAN KAMINSKI AND CHARLES KILANDER,

DEFENDANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Hoover, P.J., Peterson and Brunner, JJ.

We certify this appeal and cross-appeal to the Wisconsin Supreme Court to determine two issues:[1]

> (1) Whether Wisconsin law recognizes a bad-faith claim by an insured against its liability insurer for failing to reasonably defend the insured's unusually high deductible; and

[1] Other issues raised in the appeal and cross-appeal, such as sufficiency of the evidence and entitlement to punitive damages, are more ordinary issues that by themselves would not merit certification.

(2) Whether attorney fees in a bad faith action must be decided by the jury based on evidence presented at the trial or whether they can be awarded post-trial by the court.

BACKGROUND

Arthur Groth was injured when his vehicle was struck from behind by a Roehl truck. Roehl turned the defense over to its liability insurer, Liberty Mutual, as required by the terms of the insurance policy. The $2,000,000 policy had a $500,000 deductible. According to evidence Roehl presented at trial, Liberty did little to investigate or settle the matter until it became apparent that its own money was at stake. Liberty initially assigned the case to entry level employees who failed to investigate the accident and failed to offer a settlement even though Groth was facing financial difficulties. Groth eventually was involved in two additional accidents and ten other injury events that were inadequately investigated, and the independent medical examination was conducted under the erroneous belief that Groth's injuries had to be attributed to only two accidents. A jury awarded Groth $830,400.

Roehl then brought this bad faith action against Liberty to recover the difference between the $500,000 it was required to pay Groth and the amount the case could have settled for if Liberty had investigated and made a reasonable offer to settle. Roehl's expert witnesses and Groth's attorney testified the matter could have been settled for between $100,000 and $133,000. Neither Groth nor Roehl's president testified. The jury awarded Roehl $127,000 damages for Liberty's bad faith activities.

After trial, Roehl requested attorney fees. It calculated that it incurred $678,153 in attorney fees, witness fees and other expenses through trial, and an additional $59,803 in the post-trial motions. The trial court denied attorney

fees, concluding attorney fees were damages that had to be established by evidence at trial and presented to the jury. Roehl appeals the denial of attorney fees and Liberty cross-appeals the judgment, contending Wisconsin law does not recognize this type of bad faith action.

DISCUSSION

Does Wisconsin Recognize a Bad Faith Claim Where There was No Excess Verdict in the Underlying Action?

Liberty contends Wisconsin law has never recognized a bad faith claim by the insured against its liability insurer where the underlying action resulted in settlement or judgment for less than the policy limit. In ***Hilker v. Western Auto Insurance Co.***, 204 Wis. 1, 235 N.W. 413, *on rehearing* (1931), the court held:

> So long as the recovery does not exceed the limits of the insurance, the question of whether the claim can be compromised or settled, or the manner in which it shall be defended, is a matter of no concern to the insured. However, where an injury occurs for which a recovery may be had in a sum exceeding the amount of the insurance, the interest of the insured becomes one of concern to him. At this point a duty on the part of the insurer to the insured arises. It arises because the insured has bartered to the insurance company all of the rights possessed by him to enable him to discover the extent of the injury and to protect himself as best he can from the consequences of the injury. He has contracted with the insurer that it shall have the exclusive right to settle or compromise the claim, to conduct the defense, and that he will not interfere except at his own cost and expense.

Liberty contends this language still represents the law in Wisconsin and limits the insured's right to sue for bad faith to circumstances where the underlying judgment or settlement exceeds the policy limit. Citing ***A.W. Huss Company v.***

Continental Casualty Co., 735 F.2d 246, 249 (7th Cir. 1981) and ***Kranzush v. Badger State Mutual Casualty Co.***, 103 Wis. 2d 56, 307 N.W.2d 256 (1981), Liberty contends Wisconsin bad faith claims are limited to three types, none of which is applicable here.

Roehl asks this court to create an additional category of bad faith action that recognizes an insurer's obligation to reasonably defend the insured's high deductible. Roehl notes that Liberty's construction of the law would allow it to immediately settle every claim for $500,000 regardless of the facts and without any investigation. Roehl rejects the suggestion that it "bartered away" its right to good faith by its insurer. It distinguishes ***Hilker***, where the deductible was minimal and focuses on ***Hilker's*** holding that the insurance company's decision not to settle should be an honest and intelligent decision made in good faith. ***Hilker***, 204 Wis. at 13.

Roehl further argues that the three types of bad faith identified in ***A.W. Huss Co.*** derive from a narrow reading of introductory remarks in ***Kranzush***, and the court never purported to set forth a complete catalog of all of the reasons an insurer may be held liable to its policy holder for bad faith. For example, in ***United Capitol Insurance Co. v. Bartolotta's Fireworks Co., Inc.***, 200 Wis. 2d 284, 296-97, 546 N.W.2d 198 (Ct. App. 1996), this court recognized a potential bad faith claim based on failure to properly investigate a claim and protect a deductible. Liberty insurance argues the court of appeals has no authority to recognize a new cause of action.

Liberty also argues public policy should prohibit a claim where there is no excess judgment. Without an excess judgment, there is no particular amount from which one can identify the insured's damages. The jury would be left to

speculate what the case could have settled for. Citing ***Schlomer v. Perina***, 169 Wis. 2d 247, 253-54, 485 N.W.2d 399 (1992), a legal malpractice action, Liberty Mutual argues when only speculation can support a verdict, public policy prohibits an action. Roehl contends the judgment is not excessively speculative. It was based on expert witnesses and Groth's attorney's testimony.

We submit it is appropriate for the Wisconsin Supreme Court to determine whether Roehl's claim against Liberty should be recognized. The language that limits an action to cases involving an excess judgment or settlement derives from a 1931 case that does not specifically consider a high deductible. The Wisconsin Supreme Court has greater authority than this court to modify the common law to recognize a new cause of action and to determine whether its language in ***Kranzush*** was meant to exclude bad faith claims where there is no excess judgment or settlement.

Are Attorney Fees in a Bad Faith Action Damages that Must be Submitted to the Jury Based on Evidence at Trial or Can the Circuit Court Award Attorney Fees by Postverdict Motion?

Roehl contends it is entitled to attorney fees based on the jury's finding of bad faith. Citing ***Majorowicz v. Allied Mutual Insurance Co.***, 212 Wis. 2d 513, 534-35, 569 N.W.2d 472 (Ct. App. 1997), and ***DeChant v. Monarch Life Insurance Co.***, 200 Wis. 2d 559, 574-75, 547 N.W.2d 592 (1996), Roehl argues it is not necessary to present the issue to the jury. ***Majorowicz*** affirmed an order under WIS. STAT. § 806.07 granting additional damages in the form of attorney fees. In ***DeChant***, although the jury made no finding as to the amount of attorney fees, the court concluded the policy holder's attorney fees were recoverable as damages for bad faith.

Liberty distinguishes these cases, noting they do not hold that a finding of bad faith automatically supports recovery of attorney fees. Rather, ***Majorowicz*** described the recovery of attorney's fees as "actual damages in her bad faith case." ***Majorowicz***, 212 Wis. 2d at 536. In ***DeChant***, there was no dispute that the entitlement to attorney fees was submitted to the jury. ***DeChant*** merely sought to insert amounts into the verdict for attorney fees, replacing the jury's finding of "100% of DeChant's attorney's fees." ***DeChant***, 200 Wis. 2d at 567.

Roehl asks the court to consider the practical effect of requiring a policy holder in a bad faith action to establish its attorney fees by presenting evidence for the jury. If the reasonableness of an attorney's fee is at issue, the attorney may become a witness in the action. The testimony may disclose information that is not ordinarily presented to the jury regarding pre-trial motions, discovery and negotiations. In addition, the jury could not award attorney fees for post-trial hearings, which in this case amounted to almost $60,000.

We submit it is appropriate for the Wisconsin Supreme Court to determine the appropriate procedure for awarding attorney fees in a bad faith action.