COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1284

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PETER DREGNE, D/B/A DREGNE CONSTRUCTION COMPANY,

PLAINTIFF-RESPONDENT,

V.

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

VERGERONT, J. West Bend Mutual Insurance Company appeals from a judgment against it following a jury determination that West Bend breached its contract with its insured, Peter Dregne, and acted in bad faith. The jury awarded Dregne $25,000 in compensatory damages and $40,000 in punitive

damages. West Bend claims that the trial court erred in deciding that: (1) Dregne did not have to offer expert testimony to prove his bad faith claim; (2) that there was credible evidence to support the jury's finding of bad faith; and (3) that there was credible evidence to support the jury's award of punitive damages. We conclude that the trial court did not err and therefore affirm.

Peter Dregne owns a concrete business, Dregne Construction, which provides such services as concrete construction, excavation and snowplowing. On June 13, 1995, one of Dregne's employees was driving a 1983 GMC dump truck with a 3208 Caterpillar diesel engine hauling loads to a job site when he heard a loud knocking noise coming from the engine. Dregne and the employee inspected the engine, including checking and removing the fuel filters (which were full of water), inspecting the fuel lines and partially draining the fuel tanks. They removed fuel from the bottom of the fuel tank and one-half of what they removed was water. Dregne crawled under the truck to check the oil and determined that no water or coolant had been introduced into the oil system. Dregne and his employees made efforts to analyze and remedy the problem but without success. Dregne suspected vandalism and reported the incident to the police. He then filed a claim with West Bend. After an investigation, West Bend concluded that the engine problems were due to normal wear and tear, not vandalism, and denied the claim because normal wear and tear was not covered under West Bend's policy.[1]

Dregne brought suit against West Bend alleging breach of contract and bad faith, and sought compensatory damages for repair costs and lost business and punitive damages. At the close of Dregne's presentation of his evidence,

[1] There is no dispute that loss from vandalism is covered by the policy but loss due to normal wear and tear or due to mechanical breakdown is not covered by the policy.

West Bend moved to dismiss Dregne's claims of bad faith and punitive damages for insufficient evidence. West Bend also moved to dismiss the bad faith claim because there was no expert testimony establishing the standard of care for the insurer. The court denied the motions. The jury found that West Bend breached its contract with Dregne and awarded $25,000 in damages. The jury also found that West Bend exercised bad faith in denying Dregne's claim and acted maliciously toward him or with intentional disregard of Dregne's rights, and awarded $40,000 in punitive damages. The trial court denied West Bend's post-verdict motions, which challenged Dregne's failure to present expert testimony on the bad faith claim and the sufficiency of the evidence to support the jury's finding of bad faith and punitive damages.

EXPERT TESTIMONY

We address first West Bend's claim that expert testimony was required to establish the standard of care for the bad faith claim. In order to establish a claim for bad faith, the insured must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 377, 541 N.W.2d 753, 757 (1995). Under the first prong the insured must establish that under the facts and circumstances a reasonable insurer would not have denied the claim. ***Id.*** at 378, 541 N.W.2d at 757. In applying this test, it is appropriate for the trier of fact to determine whether the insurer properly investigated the claim and whether the results of the investigation were subject to reasonable evaluation and review. ***Id.*** This involves measuring the insurer's conduct against what a reasonable insurer would have done under the particular facts and circumstances to conduct a fair and neutral evaluation of the claim. ***Id.***

The crux of Dregne's bad faith claim is that, once West Bend obtained its appraiser's opinion that vandalism was not the cause of damage, it ignored and did not follow up on opinions presented by Dregne that the damage was caused by vandalism. West Bend contends that the average juror does not know anything about standard insurance company practices and procedures, and therefore does not know whether a reasonable insurer would have conducted any further investigation once it received the information supplied by Dregne.

In ***Weiss***, the court considered whether it is necessary in all tort causes of action alleging an insurer's bad faith that the insured produce an expert witness to testify about what a reasonable insurer would have done under the particular facts and circumstances. ***Weiss***, 197 Wis.2d at 374, 541 N.W.2d at 755. In ***Weiss***, the claim was for loss to a fire in the insured's home. ***Id.*** at 375-76, 541 N.W.2d at 756. The claim was denied because the insurer believed that the plaintiff intentionally set fire to his home. ***Id.*** at 376, 541 N.W.2d at 756. The plaintiff claimed that the insurer's incomplete and slipshod investigation prevented it from learning the facts on which the claim was based. ***Id.*** at 383, 541 N.W.2d at 759. The court first decided that expert testimony to establish a bad faith claim is unnecessary when a claim involves facts and circumstances within the common knowledge or ordinary experience of an average juror. ***Id.*** at 382, 541 N.W.2d at 758-59. Expert testimony is necessary only when there are unusually complex or esoteric matters "beyond the ken of the average juror." ***Id.***

The court then decided that the case before it did not involve unusually complex or esoteric issues requiring expert testimony. In reaching this conclusion, the court reviewed the evidence presented in the plaintiff's case in chief, which consisted of evidence contradicting each of the reasons the insurer gave for denying the claim. The court concluded that the facts presented were

well within the ken of the average juror and that an expert witness was not necessary for the jury to determine whether the insurer acted reasonably when its investigator "failed to report his taking of electrical wires from the scene, when the insurer failed to consider the fire chief's conclusion that the fire was not caused by arson, when it failed to consider the electrical wiring of the house, when it failed to procure full financial information concerning the plaintiff, and when it failed to consider that the premises were underinsured." ***Weiss***, 197 Wis.2d at 386-87, 541 N.W.2d at 760.

We do not see a significant difference between the degree of complexity or uniqueness of the facts involved in the jury's determination in ***Weiss*** and the jury's determination here. There was expert testimony in this case on the workings of the diesel engine and the cause of the problems, just as there was expert testimony on the wiring of the house and the cause of the fire in ***Weiss***. However, this case does not involve complex or technical knowledge about the insurance industry or the industry's practice. Rather, the jury had to determine such questions as whether West Bend acted reasonably when, after denying the claim, it wrote Dregne it would consider any additional information he submitted, and then, when Dregne submitted reports from persons contradicting the claims adjuster's findings, West Bend failed to share those reports with the appraiser on whose opinion West Bend relied in denying the claim. The jury also had to determine whether West Bend failed to investigate further based on those reports. This is no more complicated than the types of questions concerning the insurer's conduct that the ***Weiss*** jury had to decide. We conclude that the trial court

correctly determined that Dregne was not required to present expert testimony regarding the standard of care in the insurance industry.[2]

BAD FAITH CLAIM

A motion challenging the sufficiency of the evidence at the close of a plaintiff's case may not be granted unless, considering all the evidence in the light most favorable to the plaintiff, there is no credible evidence to sustain a verdict in the plaintiff's favor. ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). This standard applies both to the trial court and to the appellate court reviewing the trial court's ruling. ***Id.*** In ruling on a motion at the close of plaintiff's case, a trial court may not grant the motion unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn from them, and that there is no credible evidence to support a verdict for the plaintiff. ***Id.*** Because the trial court is in a better position to decide the weight and relevancy of the testimony, an appellate court must also give substantial deference to the trial court's better ability to assess the evidence. ***Id.*** at 389, 541 N.W.2d at 761. In our analysis of the evidence we, like the trial court, must draw all reasonable inferences in favor of the jury's verdict. ***Sumnicht v. Toyota Motor Sales***, 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984).

The following is the evidence most favorable to Dregne on the bad faith claim. In May of 1995, Dregne and his employee discovered the fuel cap was off the truck, leaves were stuck in the fuel tube and a bucket was near the truck. Dregne drained the fuel tank. He reported this incident to the police and to

[2] Dregne did present evidence of West Bend's policy statement and audit guidelines, which included certain guidelines the claims department was to follow in adjusting and investigating claims.

his insurance agent, although he also advised he felt he would not need to file a claim because he had resolved the problem. A few days, later the agent told Dregne he did not have comprehensive coverage, at which time Dregne became upset with the agent. The claim for the June 13, 1995 incident was assigned to West Bend claims representative Elizabeth Knaack. She initially dictated a letter of denial indicating there was no comprehensive coverage for this claim, but she then learned from the agent that Dregne had requested comprehensive coverage after the May incident. Dregne told Knaack he believed the June incident, like the May incident, was due to an act of vandalism.

Knaack had four years' experience as a claims adjuster and no experience with diesel repairs or mechanics. On June 20 Knaack spoke to Mike Riegert, an in-house appraiser for West Bend in West Bend's Green Bay office about the claim. He told her diesel fuel is more prone to have water in it than regular gasoline, that water does not normally get past the fuel injector but "in some fluky way" if the water did get past the fuel injector, the connecting rod would be bent. This, Riegert says, indicates the problem. He suggested getting an oil sample so that it could be analyzed.

Knaack hired an independent appraiser, Al Stark. At the time of his trial testimony Stark was working for insurance companies. His appraisal certificates involve mechanics but are not related to diesels and his technical education was in damage appraising; he had not overhauled an engine in over thirty years. Knaack's initial correspondence to Stark stated that "our appraiser thinks perhaps the water was in the fuel at the station or possible mechanical failure from whatever. Please determine cause of loss. Try to figure out if this is a repeat VM [vandalism] or a mechanical failure. Have oil sample sent to FABCO to be analyzed. …please check *carefully* and take a lot of pics." Stark visited

Dregne's shop on June 21 to inspect the truck and Dregne explained the circumstances leading up to the damaged engine. According to Dregne, Stark was there for less than ten minutes, and he refused to look at or test the fuel filters or fuel/water mixture that Dregne had removed from the truck. About two or three gallons of the mixture was water. Stark did not inspect the vehicle nor did he open the hood. He did not bring his tools. At the end of the visit, on Stark's request, Dregne agreed to have the vehicle towed to Trucks Incorporated for further inspection.

On June 26 Stark went to Trucks Incorporated to inspect the truck but, when he arrived, the vehicle had not been disassembled. Trucks Incorporated had removed the engine oil pan, so Stark checked the connecting rods and discovered a bent number 6 rod. Oil samples were also taken that day. Following this, Stark spoke with Knaack who wrote in her claims log, "Al is confident that this damage is *not* caused by water in the fuel," although she noted that Trucks Incorporated had not been able to disassemble the engine that day.

In a letter dated June 28, 1995, to West Bend, Stark wrote that although he was unable to inspect anything other than the lower end of the engine, he found the bent rod. "[N]o doubt the water drained into the number 6 cylinder one night and when they went to start it the next day, the rod got bent because the water would not compress in that cylinder …. The judgment at this time is that the damages to this engine were not caused by vandalism. The damages are due to mechanical breakdown such as a cracked head, a block, a cracked cylinder or head gasket." At trial, Stark acknowledged that he was speculating when he wrote the sentence beginning "No doubt…." This description of how the rod became bent was inconsistent with Dregne's employee's account of how the incident

occurred—he said he had been driving the vehicle throughout the day before the knocking began.

On June 30 Stark returned to Trucks Incorporated and inspected the engine, which was now out of the truck. Stark found what he believed to be a "blown" head gasket between the number 6 and 8 cylinders. He wrote to West Bend in a letter dated July 5 and stated that "this was just caused by age and wear. The head gasket probably blew late in the day and then over night the water seeped into number 6 cylinder…. The other cylinders would have gotten water in them also." However, Stark testified at trial that he inspected only four of the engine's eight cylinders and two of the four he inspected were damaged. He stated that because he found the bent rod, he saw no reason to continue with his inspection.

On July 6, 1995, West Bend decided to deny the claim, although it had not yet received Stark's final report. West Bend received the report on July 10 and the letter denying Dregne's claim was dated July 10. The letter stated that Knaack had received a formal report from Stark's appraisal service. The letter also advised that the head gasket was blown between cylinder numbers 6 and 8 due to wear and tear and mechanical breakdown, and damages were not caused by water in the fuel line from vandalism: "According to Mr. Stark's report, there was no question that this damage was the result of wear and tear and mechanical breakdown."

Knaack noted in her claim log that Dregne's insurance agent[3] called her and advised her that she sent out a good denial letter and that he appreciated

[3] There were two employees of the insurance agency, Combined Insurance, to whom Knaack spoke during this investigation.

the fact that "WBM stuck to their guns & denied a claim that should have been denied." She noted that she felt she built a "good rapport" with the agent. The log noted that on July 26 the agent called to inform her that Dregne consulted an attorney about his claim.

On July 27 Sue Thielen, Knaack's supervisor, spoke with West Bend's in-house appraiser who suggested that West Bend perform three additional inspections to determine whether the damage was due to vandalism or a blown head gasket. These tests were not done. A file memorandum also notes that West Bend received the results of the oil test, which indicated that the engine was in good condition and that there was no evidence of copper, tin or lead, which result from wear and tear.

On July 2 Knaack noted in her log that she had a discussion with Dregne's insurance agent in which Knaack was advised that Dregne was getting his "information" from the Wisconsin State Chamber of Commerce, and Knaack called the Chamber of Commerce to determine whether in fact they performed the function of advising on insurance complaints. On August 3, Knaack wrote a second denial letter to Dregne reaffirming the denial but stating "if you have any evidence that supports your belief that this claim is indeed a vandalism, please forward it to us so that we may review it."

Stark kept the head gasket when he disassembled the engine and, around July 26, Dregne began complaining to West Bend through his insurance agent about not having the gasket. After consulting with the legal department, Knaack wrote Dregne that West Bend was requesting Stark to return the head gasket. West Bend sent the letter certified return receipt requested to make sure

that Dregne received the letter "because a good rapport had not been made with the insured," according to Knaack.

Dregne and Dregne's counsel submitted three letters regarding the damaged engine after West Bend denied Dregne's claim. One was dated August 2, 1995, from Charles Johnson who was employed in a truck repair business. This stated that Johnson reviewed the head gasket and photos of the head and block and determined that the damage was caused by water through the injectors; it also explained the basis for the conclusion and for disagreement with Stark's opinion. In an August 4, 1995 letter, Gib Dany, employed at FABCO Equipment, Inc., stated that the cylinder scoring is not normal wear and tear but is caused by system malfunction and confirmed that the fuel injection pump can and will pick up water and inject it into the cylinder. A joint letter dated October 20, 1995, from George Murphy, service manager at Fagen Chevrolet in Janesville, and Dave Lipke, contract engineer rebuilder for Diesel Specialists in Madison, stated that the damage arose from water being injected into the cylinder and explained the reasons for that conclusion.

Knaack did not contact these persons or examine their statements further. She also did not discuss these statements with Stark or with the in-house appraiser. Knaack testified this was because West Bend was confident that the advice it received from Stark was a good opinion and there was "no sense going any further." The claims log showed that on October 27, 1995, a West Bend employee made a call to a specialist in Chicago, who was "too expensive to hire," but the employee "[ran] Stark's finding past" the specialist and the specialist agreed with Stark. This specialist is unnamed and there is no other communication with or from him in the record.

In ruling on both the motion to dismiss the bad faith claim and the motion to set aside the jury's verdict on that claim, the court concluded that, looking at the evidence most favorable to Dregne and drawing all reasonable inferences in favor of Dregne, a reasonable jury could find bad faith. In particular, the court noted that there was a reasonable inference from the evidence that after the May incident when there was no coverage, West Bend was suspicious when Dregne reported another vandalism claim in June. West Bend viewed Dregne's claim from the start as suspect, had a "mindset" from early on not to pay the claim, and set about "bolstering" its position instead of undertaking an unbiased and thorough investigation. The court also observed that West Bend's failure to have Stark review the opinions Dregne provided pursuant to the company's request gave rise to a reasonable inference that West Bend was determined to deny the claim. We conclude therefore that the trial court applied the correct standard. Applying that same standard ourselves and giving the requisite deference to the trial court's better position to assess the evidence, we conclude that a reasonable jury could find bad faith. In addition to the evidence and inferences the trial court referred to, we point, as another example, to the evidence indicating the claims investigators either ignored or did not follow through on advice from the in-house appraiser when that advice conflicted with Stark's conclusion.

West Bend points to other evidence that provides explanations for its actions that are consistent with a good faith investigation, and we, like the trial court, acknowledge that a reasonable jury could have found no bad faith. However, this jury did find bad faith, and we, like the trial court, must accept the jury's verdict since it is based on a reasonable view of the credible evidence. West Bend also argues that since Stark concluded there was no vandalism, the existence of opposing opinions simply means the issue was "fairly debatable," thereby

precluding a finding of bad faith. "Fairly debatable" means that there is a reasonable basis for the insurer's denial and "implicates whether the facts necessary to evaluate the claim are properly investigated and developed or recklessly ignored and disregarded." ***Anderson v. Continental Ins. Co.***, 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978). This involves an assessment of the reasonableness of Stark's investigation leading to his conclusion as well as the reasonableness of West Bend's evaluation and review of Stark's conclusions and of conflicting conclusions and information. The jury evidently was not persuaded that Stark's opinion was a reasonable basis on which to deny the claim, in view of the other information that was available to West Bend, or would have been available had it conducted a proper investigation. The jury could reasonably reach the result it did from the evidence.

PUNITIVE DAMAGES

West Bend argues that the trial court improperly denied its motion to dismiss the claim for punitive damages and its post-verdict motion to set aside the jury's finding of punitive damages. West Bend contends that the trial court misunderstood the correct standard for punitive damages and even acknowledged the lack of evidence to support punitive damages.

West Bend is correct that proof of bad faith does not automatically entitle a plaintiff to punitive damages. ***Anderson***, 85 Wis.2d at 697, 271 N.W.2d at 379. As the trial court correctly noted, there must, under § 895.85(3), STATS.,[4]

[4] Section 895.85(3), STATS., provides:

> STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

(continued)

be a showing that West Bend acted maliciously toward Dregne or "in intentional disregard of [his] rights." Section 895.85(3). In evaluating the evidence in the context of the post-verdict motion, the trial court observed that one of the rights of the insured was to have a "fair and impartial evaluation of the claim and to have a review of—by the insurance company of any information in regard to whether or not the claim should be either paid or denied." The court concluded that the evidence that the information submitted was not given to Stark to review, that the recommendation within the company that additional tests be conducted was disregarded, and that these decisions were made by persons with no technical expertise was credible evidence and could give rise to reasonable inferences that West Bend intentionally disregarded Dregne's right to a proper investigation and a fair evaluation.

The trial court applied the proper legal standard in assessing the evidence on punitive damages and we agree with its conclusion that a reasonable jury could reach the result it did for the very reasons explained by the court. We do not agree with West Bend that the trial court stated that the evidence was insufficient to support a punitive damage claim. The trial court did state, in deciding the motion to dismiss, that "in my view … there's not a strong case for punitive damages." But the court immediately followed this statement with the observation that the court was not "the trier of fact." The court was simply acknowledging that a reasonable trier of fact could find no punitive damages, and, were the court the trier of fact, it would probably do that. This is consistent with, not inconsistent with, the court's conclusion that a reasonable fact-finder could

---

This statute applies to all actions filed after May 17, 1995, and therefore applies to this action.

find punitive damages, if the evidence were viewed as required in the context of deciding the motion.

We also disagree with West Bend that the court misunderstood the legal standard for punitive damages and thought it was required to submit the question of punitive damages to the jury simply because there was sufficient evidence to submit the bad faith claim to the jury. The court expressly stated that that was not required by the legal standard. Reading all the court's comments in context, we understand the court to say that the punitive damages question had to be submitted to the jury in this case because of the reasonable inferences the jury was entitled to draw from the evidence supporting the bad faith claim. That is not a misstatement of the law. The same evidence that supports a finding of bad faith in this case may or may not support a punitive damage claim, depending on the inferences drawn from the evidence. The court correctly recognized that the evidence supporting the bad faith claim in this case gave rise to conflicting reasonable inferences, that the jury was entitled to choose those that favored Dregne, and that the evidence and inferences favoring Dregne were sufficient to permit a reasonable jury to find the intentional disregard of Dregne's rights that is required for an award of punitive damages.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.