COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-2404

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

EARL GHELF, AND DORIS GHELF,

PLAINTIFFS-RESPONDENTS,

V.

WESTERN WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT,

UTICA MUTUAL INSURANCE COMPANY, AND FLEISS INSURANCE AGENCY, INC., D/B/A GILLESPIE INSURANCE AGENCY F/K/A THE J.C. GILLESPIE INSURANCE AGENCY, INC.,

DEFENDANTS-APPELLANTS.

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

Before Eich, Roggensack and Deininger, JJ.

EICH, J. Utica Mutual Insurance Company appeals from a judgment awarding damages to Earl and Doris Ghelf in their action against Utica's insured, the Fleiss Insurance Agency, Inc., and one of its employees, Michael Gillespie.[1] The Ghelfs alleged that Gillespie, an insurance agent working for the Fleiss Agency, was negligent in failing to procure the coverage they had requested from him. They claimed the policy obtained by Gillespie was of a type that paid them less after a building they owned was damaged by fire than they would have received had the requested policy been issued. The Ghelfs' complaint also alleged a claim for breach of contract against the insurer who had issued the policy, Western Wisconsin Mutual Insurance Company (WWMIC), in which they asserted that WWMIC had "misadjusted" their loss—specifically, that the company had undervalued the destroyed property by depreciating its replacement cost to reach a "cash value" figure.[2] Utica cross-claimed against WWMIC for indemnity and contribution.

Shortly before trial, the Ghelfs settled their claim against WWMIC for nominal damages, and the case went to trial on their claims against Utica and its insureds. At the conclusion of the evidence, the circuit court included both claims in the verdict and the jury found in the Ghelfs' favor in each instance, determining: (1) that WWMIC had breached its contract with the Ghelfs, causing them damages in the sum of $45,627.04; and (2) that Gillespie was 100% causally

[1] Gillespie and the Fleiss Agency are co-appellants.

[2] In appraising the loss, WWMIC's adjuster first estimated the replacement cost of the damaged portions of the building and then, using a set of tables and schedules, adjusted that cost for depreciation and other variables in order to arrive at the actual cash value of the loss. The Ghelfs, of course, alleged that they should have been reimbursed for the replacement cost.

negligent in "fail[ing] to put into effect [the] insurance coverage requested by the Ghelfs," also resulting in damages of $45,627.04.

The court, concluding that the jury's answer to the breach-of-contract claim against WWMIC was unsupported by any evidence in the record, granted the Ghelfs' motion to change the jury's answer with respect to the Ghelfs' breach of contract claim against WWMIC from "yes" to "no"—essentially finding that there was no credible evidence to support the answer—and entered judgment in favor of the Ghelfs and against Utica for the sum found by the jury.[3] Utica appeals, arguing that the jury's verdict against WWMIC is supported by the evidence and that, as a result, the circuit court erred in failing to grant its motion for judgment on the jury's verdict against WWMIC and also on its cross-claim.

We first address a difference in the parties' positions on the scope of our review of the jury's verdict. The Ghelfs argue that we may not overrule the circuit court's changing of the jury's answer to the breach of contract question "unless the record reveals that the circuit court was 'clearly wrong.'" We acknowledge that the supreme court, in ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 388-90, 541 N.W.2d 753, 761-62 (1995), clung to statements in older cases[4] to the effect that a circuit court's decision to grant a directed verdict or dismiss for the insufficiency of evidence—or to change a jury's answer to a

[3] In their pretrial settlement with WWMIC, the Ghelfs gave the company a ***Pierringer*** release. As a result, the Ghelfs stand in WWMIC's shoes for indemnity purposes and a verdict against WWMIC will have the effect of wiping out their recovery from Utica. Utica, of course, wants WWMIC to be held solely responsible for the Ghelfs' loss.

[4] *See*, *e.g.*, ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 110, 362 N.W.2d 118, 127 (1985); ***Olfe v. Gordon***, 93 Wis.2d 173, 186, 286 N.W.2d 573, 579 (1980).

special verdict question[5]—will not be overturned unless the court was "clearly wrong." It defined the phrase, however, to be the equivalent of the traditional "any credible evidence" standard:

> [T]he "clearly wrong" standard and the "no credible evidence" standard must be read together. When a circuit court overturns a verdict supported by "any credible evidence," then the circuit court is "clearly wrong" in doing so. When there is *any* credible evidence to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict … must stand."

Id. at 389-90, 541 N.W.2d at 761-62 (internal citations and quotation marks omitted).

The standard guiding our review of the circuit court's decision to change the answer regarding WWMIC's liability, then, is the "any credible evidence" test: Before overturning a verdict, the court—either the circuit court or an appellate court—must be satisfied that, considering all the credible evidence, and all reasonable inferences that can be drawn from that evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. Section 805.14(1), STATS.; ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996).

Utica claims that sufficient evidence to support the verdict that WWMIC breached its contract with the Ghelfs may be found in the testimony of its expert witness, Al Nelson, an insurance agent with some experience in adjusting small claims. According to Utica, Nelson's testimony on two points

[5] A motion to change a verdict answer has the effect of challenging the sufficiency of the evidence to support the verdict, § 805.14(1), STATS., and we review all such challenges under the same standard. *See* ***Lily R.A.P. v. Michael J.W.***, 210 Wis.2d 132, 143, 565 N.W.2d 179, 184 (Ct. App. 1997).

constitutes "abundant credible evidence … that WWMIC breached its contract by not paying the full policy limits." Specifically Utica refers us to Nelson's opinions that: (1) WWMIC's adjuster erred by using straight-line depreciation throughout his calculations, with the result that certain items were depreciated which should not have been; and (2) the adjuster improperly used a 36% depreciation factor in determining the cash value of the property and then depreciated various other items at 64%. Nelson, whose testimony was based solely on his review of the adjuster's file, never gave an independent opinion as to how the loss should have been adjusted. And he conceded on cross-examination that he (a) had never talked with the adjuster about the actual methods used to determine the loss, (b) had never inspected the building himself, (c) had never checked to determine whether the depreciation figures used by the adjuster were proper, and (d) had "no way of telling" whether the adjuster's final figure was right or wrong.

WWMIC's adjuster, Ron Parent, testified in rebuttal that he didn't use straight-line depreciation at all, but rather determined the replacement value of the building, the acceptable depreciation, and the building's actual cash value, by using a standard industry tool known as the "Boeckh System," which involves a series of schedules and tables that "take[] into account [the property's] obsolescence," as well as economic and functional considerations. As for Nelson's complaint about using two depreciation figures, 36% and 64%, Parent testified that the notes in his file from which Nelson got these figures related to something entirely different and had "no relevance whatsoever" to his calculation of the Ghelfs' loss. In short, the evidence shows that Nelson's two primary criticisms of Parent's adjustment of the loss are based on his misreading of Parent's notes and his misunderstanding of the manner in which Parent and WWMIC adjusted the loss. Beyond that, it is indeed difficult to ascertain how the

jury could have arrived at its award of damages based on Nelson's testimony, for his conclusion was that WWMIC should have paid the Ghelfs $29,455—or approximately $15,000 more than they were in fact paid, yet the jury found the damages to be $45,627.04, a figure wholly unsupported by anything Nelson (or anyone else) put forth at trial.[6]

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[6] Utica also argues that Ghelf's testimony supports the verdict. All Ghelf said, however, was that he "wasn't too happy" with WWMIC's figure, and that he believed the adjusted replacement cost to be "[w]rong by about … 150 some thousand dollars, I'd say … $170,000." While it is true that an owner is competent to testify as to the value of his or her property, such an undefined, uncertain statement is, in our view, wholly inadequate to support the jury's verdict.

Finally, Utica refers to a portion of Nelson's testimony where he outlined what he described as an "inconsistency" in Parent's adding-up of the repair bills for the building. Nelson testified as follows:

> Q [W]ould you explain to the jury what you disagree with…?
>
> A … I don't understand where the total amount of the bills came from that the adjust[e]r represented in the Proof of Loss where he started before he deducted depreciation.
>
> Q All right. And his figure on that is $41,033.98?
>
> A That is correct. But the in – the business that are attached to his file total $45,007.50. Or approximately $4,000 more than what he indicated as the total amount of bills on the Proof of Loss.
>
> Q All right. So in your opinion, instead of using $41,000 as the replacement figure, the figure $45,000 some odd dollars should have been used….
>
> A [A]ssuming that there are no duplications in here that I'm not aware of. There don't appear to be any.

When asked about Nelson's comments, Parent stated: "I don't know how he arrived at that"; and agreed with Utica's counsel's statement that the jury could "do that math" itself to determine whether he had made an arithmetical error. Parent stated that if Nelson were correct on the point, "[I]t's possible" that the amount would have changed, although it would be "[v]ery little." We do not consider this to be sufficient evidence to support the jury's finding that WWMIC breached its contract with the Ghelfs in adjusting the loss, or that the Ghelfs were damaged thereby in the sum of $45,627.04.

We have noted above that a jury's verdict should be upheld if there is any credible evidence to support it. Nevertheless, "a jury cannot base its findings on conjecture and speculation." ***General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc.***, 215 Wis.2d 104, 122, 572 N.W.2d 881, 890 (Ct. App. 1997) (citations omitted). We conclude that there was no evidence before the jury to support the answer to the breach-of-contract and related damage questions. It follows that the circuit court was not clearly wrong in changing the answers to those questions.

By the Court.—Judgment affirmed.

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