COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2739

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

BERT SEIGEL AND KATHY SEIGEL,

PLAINTIFFS-APPELLANTS,

v.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 DYKMAN, P.J. Kathy and Bert Seigel appeal from a portion of a judgment against Allstate Insurance Company (Allstate) awarding them damages on their breach of contract claim against Allstate. The judgment followed an order granting Allstate's post-trial motion to set aside the part of a jury verdict finding

that Allstate also engaged in bad faith in handling the Seigels' insurance claim. The Seigels argue that the trial court misapplied the standard for directing a verdict and substituted its own opinion of the evidence for that of the jury by disregarding expert testimony and other evidence of bad faith. We conclude that the trial court applied the proper legal standard in directing the verdict. We further conclude that the record contains no credible evidence that Allstate engaged in bad faith. Accordingly, we affirm.

I. Background

¶2 The Seigels purchased a motor home in Arizona in the spring of 1997 and insured it with Allstate. The portion of the Seigels' insurance policy with Allstate entitled "Protection Against Loss to the Auto" covered fire damage to the motor home and stated that Allstate would cover such a loss at actual cash value. On November 6, 1997, Bert Seigel was driving the motor home while on a trip to visit some relatives. The engine began sputtering, so Bert pulled over and soon discovered that there was a fire under the hood. Bert went for help, but by the time firefighters arrived, the fire had completely destroyed the motor home, except for the frame. Bert contacted Allstate on the same day to report the loss.

¶3 Also on that same day, Dorothy Phillips of Allstate sent Bert a letter explaining that Allstate would begin working on the claim. After some initial work on the claim by Phillips or another file handler, Allstate adjuster Chad Olson took over the claim on December 15. Olson contacted the Seigels within two days of receiving information on their claim. Using Allstate's standard valuation methods, Olson conducted a valuation of the motor home and offered the Seigels $19,270 for the loss. The Seigels maintained that the motor home was in excellent condition, and refused the offer because they thought it was too low. On the

insurance policy application, they had estimated the value at $22,000. The actual cash value of the motor home remained in dispute. The parties also disputed whether the Seigels paid $20,000 for the motor home, or some lesser amount.

¶4 Olson made a second offer of $22,610, which assumed an above average condition of the motor home, but the offer was contingent on the Seigels' ability to prove that the motor home was actually in above average condition. Olson asked for documentation such as a receipt for new tires and photographs of the motor home before it burned. The Seigels did not have photographs or other documents that could prove that the motor home was in above average condition. They told Olson that the records they did have were burned in the motor home fire.

¶5 The Seigels' claim was transferred to Allstate's Special Investigative Unit and thereafter handled by another adjuster, Carl Sincere. On January 13, 1998, Sincere met with Bert, provided him with a proof of loss form, and took a recorded statement. The Seigels completed the proof of loss the next day. The Seigels also provided Allstate a certificate of title on January 12 or 13. On January 26, Allstate sent a letter to the Seigels asking that they provide a variety of additional documentation in support of their claim and that Bert submit to an examination under oath. The Seigels' policy contained no provisions explicitly requiring that a policy holder submit to an examination under oath, so Bert refused to do so after consulting an attorney. Sincere then sent the Seigels a letter dated February 20 denying their claim. Referring to language purportedly contained in the Seigels' insurance policy, the letter stated that Allstate denied the claim because the Seigels failed to cooperate in settling the claim and because the Seigels misrepresented facts material to the claim.

¶6 The Seigels sued Allstate alleging one cause of action for breach of contract and one for bad faith. The suit went to trial, and after the close of the Seigels' evidence, Allstate moved for a directed verdict on the bad faith claim. The trial court took the motion under advisement and reserved its ruling until after the jury verdict. On the breach of contract claim, the jury found that Allstate wrongfully denied the Seigels' insurance claim and determined that the fair market value of the motor home was $22,022.[1] The jury also found that Allstate engaged in bad faith. Allstate renewed its motion for directed verdict on the bad faith claim. The trial court granted Allstate's motion, setting aside the part of the jury verdict pertaining to bad faith. The Seigels appeal.

II. Standard of Review

¶7 A motion for a directed verdict challenges the sufficiency of the opposing party's evidence. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). When considering a motion for directed verdict, a trial court "must view the evidence most favorably to the party against whom the verdict is sought to be directed." ***Millonig v. Bakken***, 112 Wis. 2d 445, 450, 334 N.W.2d 80 (1983). Therefore, "a verdict should be directed only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion." ***Id.*** at 451. While we use these same standards on review, *see* ***id.*** at 450, we give "substantial deference to the trial court's better ability to assess the evidence," ***Weiss***, 197 Wis. 2d at 389 (quoting ***James v. Heintz***, 165 Wis. 2d 572, 577, 478 N.W.2d 31 (Ct. App. 1991).

> [W]hen the trial judge rules, either on … motion for a directed verdict, or motion to set aside the verdict, that

[1] For purposes of the insurance policy, actual cash value is the same as fair market value.

> there is or is not sufficient evidence upon a given question to take the case to the jury, the trial court has such superior advantages for judging of the weight of the testimony and its relevancy and effect that this court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision, but only when the mind is clearly convinced that the conclusion of the trial judge is wrong.

Helmbrecht v. St. Paul Ins. Co., 122 Wis. 2d 94, 110, 362 N.W.2d 118 (1985) (citation omitted).[2]

III. Analysis

¶8 The Seigels first argue that the trial court misapplied the standard for directing a verdict because the trial court cited a "middle level of burden of proof" in discussing whether to set aside the verdict on bad faith. However, when the trial court was discussing the middle level of proof, it was referring to the clear and convincing evidence burden of proof for bad faith claims, not the standard for directing a verdict.[3] The trial court correctly recited the directed verdict standard earlier in its decision. Therefore, we conclude that the trial court applied the proper standard in assessing the sufficiency of the evidence for the Seigels' bad faith claim.

---

[2] We have stated that we will not overturn a trial court's decision to set aside a verdict due to insufficient evidence unless the record reveals that the circuit court was "clearly wrong." ***Macherey v. Home Ins. Co.***, 184 Wis. 2d 1, 18, 516 N.W.2d 434 (Ct. App. 1994) (citation omitted). This "clearly wrong" standard and the "any credible evidence" standard are not two different standards, but only flip sides of the same coin. A trial court is "clearly wrong" when it sets aside a verdict despite the existence of credible evidence to the contrary. ***Weiss***, 197 Wis. 2d at 389.

[3] "Bad faith on the part of an insurance company must be proved by clear and convincing evidence." ***Johnson v. American Family Mut. Ins. Co.***, 93 Wis. 2d 633, 645, 287 N.W.2d 729 (1980).

¶9 To prove a claim for bad faith, a plaintiff 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. *See* ***Weiss***, 197 Wis. 2d at 377. The bad faith standard has two components, one subjective and one objective. *See* ***id.*** Both are required. *See* ***Mills v. Regent Ins. Co.***, 152 Wis. 2d 566, 575, 449 N.W.2d 294 (Ct. App. 1989).

¶10 The objective component is the absence of an objectively reasonable basis for denial. *See* ***id.*** The policy holder must establish that, under the facts and circumstances, a reasonable insurer could not have denied or delayed payment of the claim. *See* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 578, 547 N.W.2d 592 (1996). Bad faith claims cannot be maintained where an insurer makes an investigation of the facts and law and concludes on a reasonable basis that the claim is fairly debatable. *See* ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 693, 271 N.W.2d 368 (1978).

¶11 The subjective component is the insurer's knowledge or reckless disregard of the absence of a reasonable basis. *See* ***Mills***, 152 Wis. 2d at 575. The subjective component may be inferred from an investigation that recklessly disregards the facts. *See* ***id.*** Nevertheless:

> [I]t is almost impossible to conduct an investigation as to which some question of its adequacy, sufficient to get to the jury, cannot, in hindsight, be raised. Thus if there is an objectively reasonable basis to deny coverage, existence of investigative flaws, standing alone, are not enough to permit recovery in tort against an insurer.

Id. at 576 (citation omitted). Because we conclude below that the record contains no credible evidence that Allstate lacked a reasonable basis for denying the Seigels' claim, we need not consider the subjective component of bad faith or

evidence of investigative flaws. *See* ***Samuels Recycling Co. v. CNA Ins. Cos.***, 223 Wis. 2d 233, 250, 588 N.W.2d 385 (Ct. App. 1998).

¶12 As the Seigels correctly point out, because of interim changes to their policy, the misrepresentation language quoted in the denial letter was not in effect at the time of the fire. The Seigels are also correct that the failure to cooperate language quoted in the denial letter was taken from a section of the policy not applicable to losses due to fire. However, the fact that Allstate quoted inapplicable language in the denial letter does not mean it had no reasonable basis to deny the Seigels' claim. The section of the Seigels' policy that applied to loss by fire stated: "As soon as possible any person making claim must give [Allstate] written proof of loss, *including all details reasonably required* ...." (Emphasis added). In addition, the proof of loss form, a sworn statement bearing both Seigels' signatures, states that "Any other information that may be required [by Allstate] will be furnished on call ...."

¶13 Additionally, Allstate's questions of the Seigels were reasonable because it was required to pay the actual cash value of the motor home, and all it had to rely on were the Seigels' statements as to the condition and purchase price. Therefore, the Seigels' credibility was central to the claim. The record contains overwhelming evidence that the Seigels either could not or would not provide information Allstate needed to settle the claim. Bert testified that he did not provide the title until January 12, 1998, over two months after the loss and after Allstate had already made two offers to settle. The Seigels failed to provide Allstate with documentation of check and cash amounts used for the purchase of the motor home until after they received the denial letter. Some of this purchase price documentation was provided to Allstate only after the Seigels commenced litigation. The Seigels also failed to provide Allstate with a bill of sale until after

Allstate denied their claim. The bill of sale was in the form of a receipt for $20,000 dated April 30, 1998, over a year after the purchase of the motor home. In addition, Bert refused to undergo an examination under oath that Allstate had requested because of the changes in his story. Sincere and John Graeber, another Allstate witness, both testified that the Seigels' failure to cooperate and provide information was, in fact, a basis for the eventual denial of the Seigels' claim. Even Bert admitted that he could have received $22,610, which was more than the jury awarded on the claim, if he would have cooperated in providing the information that Allstate requested.

¶14 The Seigels assert that the following actions by Allstate constituted bad faith: Allstate neglected to explain to the Seigels whether tax, title, and registration fees were included in the offers of settlement; Allstate also assured the Seigels at several points that it was handling the claim as quickly as it could, although the claim was not resolved and denied until more than three months after the loss; Sincere testified that it would have been better if Allstate had sent the Seigels a proof of loss form earlier; Sincere also admitted that during Bert's recorded statement, he asked Bert some questions to which he already knew the answers in order to assess Bert's credibility; finally, it was apparent from Sincere's testimony that he was initially mistaken, and perhaps still confused as of the trial date, about language in the denial letter and whether or not it was actually a part of the Seigels' policy. We conclude that none of this constitutes any evidence that Allstate lacked a reasonable basis to deny the Seigels' claim.

¶15 The Seigels next argue that when the trial court set aside the verdict on bad faith, it improperly determined that the Seigels' experts' testimony was deficient as a matter of law, and thus improperly disregarded credible evidence of bad faith. The question of credibility of witnesses is normally a matter for the jury

to determine and not for a trial court or for an appellate court unless it can be said that the testimony is incredible as a matter of law. *See* ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978). However, we agree with the trial court that the Seigels' experts' testimony on bad faith was incredible as a matter of law.

¶16 The Seigels called two experts who testified that Allstate engaged in bad faith. One of the experts, LeRoy Utschig, identified himself as an "insurance educator." He was not an attorney, and he did not discuss the correct legal standard of bad faith in Wisconsin. Utschig explicitly misstated the legal standard on both direct and cross-examination. On direct examination, Utschig testified as follows:

> Q. Could you tell us what bad faith means?
>
> A. The simple definition of bad faith is that the insurance company has failed to properly handle a loss.
>
> Q. Okay. When you say the simple definition, I mean can it become more complicated than that?
>
> A. The definition, we get into the laws and court decisions and that, they can become exceedingly complex, can be very, very difficult to understand. And I just come back to what I call a working definition—
>
> Q. Okay.
>
> A. —which is, [have] proper procedures been done.

Then, on cross-examination, Utschig further testified:

> Q. Mr. Utschig, I wanted to reiterate some of your testimony or question you on it. First of all, can you again give me your definition of bad faith.
>
> A. My definition of bad faith is that the insurance company declines coverage when the claim should be paid.
>
> Q. Okay. Just that?
>
> A. Yeah, just that.

¶17 The Seigels' other expert was Grant Hubbard. Hubbard had a law degree and experience in the insurance industry. However, his professional activities over the last ten years consisted mostly of appearing as an expert witness and performing volunteer work, the bulk of which was unrelated to insurance law. While Hubbard was able to articulate an approximation of the legal standard for bad faith, his interpretation of that standard was equivocal. For example, Hubbard appeared to understand the two component test for bad faith as disjunctive rather than conjunctive. He also equated bad faith with "slanderous remarks."

¶18 Hubbard premised his initial opinion that Allstate committed bad faith on four key facts:

> Q. Would you agree, sir, that at the time you gave a deposition on May 20th you gave the following four reasons for your opinion as to bad faith? One, that there was no contact by Allstate until January 13th. Two, no offer until after suit. Three, no investigation or effort to get information in Arizona. And, four, that [Mr.] Seigel had already given them the name of [the seller of the motor home] in January. You gave those four reasons, did you not?
>
> A. They sound familiar.

When counsel for Allstate questioned Hubbard more specifically on each of these premises, however, his answers were equivocal to say the least.

> Q. Now, you also indicated as one of your four reasons that there were no offers until after suit.
>
> A. I didn't know Mr. Olson. I wasn't privy to Mr. Olson's deposition. And had I known that, I would not have made that comment. In fact, I was reminded that the offer was made before suit was filed, which I accepted as being the case.
>
> Q. And I'm not even—I'm not even suggesting, sir, that it's any fault of yours that you didn't have that information. I'm just asking you if the second basis

> for your opinion, no offers until after suit, also automatically proved to be incorrect?
>
> A. He was forced to bring suit to get the case in perspective. I think that's one of the areas that I talked about.
>
> Q. But my question is: Your position as of May 20th that there were no offers till after suit through whosoever fault is wrong?
>
> A. It's my understanding that was wrong, that's correct.

¶19 We agree with the trial court that the experts' testimony on the issue of bad faith was deficient as a matter of law. The excerpts from Utschig's testimony demonstrate that he was making a conclusion that Allstate committed bad faith based on an improper legal standard. While Hubbard might have applied a proper legal standard, his conclusion that Allstate committed bad faith was based on inaccurate factual assumptions and was also deficient.[4]

¶20 The Seigels also contend that the trial court erred in failing to submit a question on punitive damages to the jury. However, the Seigels could not have received an award of punitive damages unless they first received compensatory damages on their bad faith claim. *See* ***Weiss***, 197 Wis. 2d at 393. Similarly, because we have already concluded that a directed verdict in favor of Allstate on

[4] The Seigels also argue that the trial court erred in excluding proposed jury instructions on Allstate's alleged violations of WIS. ADMIN. CODE § Ins 6.11, which defines unfair insurance practices, and in preventing Hubbard from testifying that § Ins 6.11 was part of the legal basis for his opinion. The Seigels contend that under ***Heyden v. Safeco Title Ins. Co.***, 175 Wis. 2d 508, 498 N.W.2d 905 (Ct. App. 1993), *overruled by* ***Weiss***, 197 Wis. 2d at 382, § Ins 6.11 is relevant and admissible in bad faith claims and that they were entitled to have Hubbard discuss § Ins 6.11. We acknowledge that violations of § Ins 6.11 may be relevant to a bad faith claim. *See* ***Heyden***, 175 Wis. 2d at 521; *but see* ***Weiss***, 197 Wis. 2d at 382. However, we have already determined that the facts in the record fail to show any credible evidence of bad faith by Allstate. Therefore, we need not address the questions of whether jury instructions and expert testimony invoking § Ins 6.11 were necessary.

the bad faith claim was proper, we need not address the Seigels' contention that the trial court erred in failing to consider "other damages" that may be compensable upon a successful bad faith claim.

IV. Conclusion

¶21 Upon our review of the entire record, we conclude that it does not contain any credible evidence tending to show that Allstate lacked a reasonable basis for denying the Seigels' insurance claim. Therefore, the trial court properly set aside the part of the jury verdict finding that Allstate committed bad faith.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.