COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 18, 1997

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(1), STATS.

NOTICE

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No. 96-0418

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

TIMOTHY L. LORENZ,
d/b/a NORTHWEST MILLING,

Plaintiff-Appellant-
Cross-Respondent,

v.

RURAL MUTUAL INSURANCE COMPANY,

Defendant-Respondent-
Cross-Appellant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Timothy Lorenz appeals a judgment granting a directed verdict in favor of Rural Mutual Insurance Company because the evidence was insufficient to support the jury's punitive damages award to Lorenz in his bad faith claim against Rural. Lorenz argues that the court erred

when it directed the verdict because there was credible evidence to support punitive damages.

On appeal, Rural argues that the court properly directed the verdict on the punitive damages award but erroneously denied a directed verdict on the bad faith claim, and the submission of the punitive damages issue to the jury was prejudicial error. Rural challenges the denial of its postverdict motions and argues that in the alternative a new trial should be granted.

On cross-appeal, Rural makes the following arguments: its motions for summary judgment and reconsideration should have been granted, its motion for a directed verdict or motions after verdict should have been granted, discovery was wrongly denied, prejudice was caused and defenses were denied to Rural by the lack of disclosure of the assignment and the terms of the transfer of legal representation, prejudice was caused by a breach of the rule prohibiting a lawyer as a witness, there was prejudicial evidence on the punitive damages claim, and the question of jury intent was sufficiently raised by the juror affidavits and circumstances of the trial to require an inquiry.

We conclude that the court properly denied a directed verdict on the bad faith claim, but because there was credible evidence to support the punitive damages award, it erred when it directed the verdict on the punitive damages claim. We reject the remainder of Rural's arguments, and therefore reverse the judgment and remand with directions to reinstate the punitive damages award.

Lorenz's bad faith claim arose from an excess verdict awarded against Lorenz in a 1992 personal injury case in which he and Rural were sued by Dennis Cottor. Cottor was represented by attorney Thomas Bell. Lorenz designed and built a grain storage structure for Cottor's farm. When Cottor was working on the structure on October 25, 1991, it collapsed and he fell twenty-five feet to the ground and was injured. Rural insured Lorenz under a $500,000 liability policy. Cottor's settlement offers increased from $200,000 to $500,000 as the case developed. Rural's offer of judgment in the amount of $90,000 was rejected. The parties were unable to resolve the case and trial commenced.

The jury in the 1992 personal injury case rendered a total verdict of $652,213.18 to Cottor. As a result of the excess verdict, Lorenz filed this bad faith lawsuit against Rural, alleging that Rural breached its duty to defend him in the personal injury lawsuit, Rural acted in bad faith, and Rural's conduct was outrageous. Attorneys Bell and James Drill represented Lorenz. At trial, Lorenz presented evidence that included the testimony of attorney Greg Conway and Aetna Insurance claims manager David Glaza, both of whom testified that Rural acted in bad faith.

At the close of evidence, the court denied Rural's motion for a directed verdict on the bad faith claim, but took the motion under advisement with regard to the punitive damages claim and submitted the punitive damages question to the jury.[1] The jury returned a verdict for Lorenz, deciding that Rural breached its duties, acted in bad faith and engaged in outrageous conduct in its representation of Lorenz. By stipulation, the damage award for the bad faith claim was the amount of the excess verdict, plus interest. Judgment in the amount of $177,634.48, together with costs and disbursements, was entered on Lorenz's bad faith claim. The jury also awarded $110,000 to Lorenz, plus costs, as punitive damages for Rural's outrageous conduct.

Relevant to this appeal, Rural renewed its request for a directed verdict on the punitive damages claim. The court granted the directed verdict on the punitive damages award, finding no credible evidence to support the jury's determination that the conduct of Rural, its agent and its attorney were outrageous. It is from this ruling that Lorenz now appeals.

DIRECTED VERDICT STANDARD OF REVIEW

The court properly grants a directed verdict when it considers "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made" and determines that "there is no credible evidence to sustain a finding in favor of such party." *See* § 805.14(1), STATS. Whether the trial court erroneously directed the verdict is a

[1] The jury was instructed in accordance with WIS J I—CIVIL 1707.

question of law we review de novo. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 541 N.W.2d 753 (1995).

The parties dispute the facts of this case.[2] However, as explained by our supreme court, "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 (1995) (citation omitted) (emphasis in the original). We must search the record for evidence to support the jury's verdict and accept the inferences the jury could have drawn from that evidence in order to reach its verdict. *See* ***id.*** at 398, 541 N.W.2d at 765.

[2] The parties dispute many of the facts associated with the adequacy of Rural's representation of Lorenz in the underlying personal injury lawsuit. However, it is the role of the jury, and not this court, to assess the weight of the evidence and witnesses' credibility. *See* ***Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co.***, 146 Wis.2d 470, 481, 431 N.W.2d 689, 694 (Ct. App. 1988). We will not engage in factfinding. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980).

BREACH OF DUTY AND BAD FAITH

Rural argues that there was insufficient evidence to support the bad faith claim. In Wisconsin, an insurer has the duty to investigate and evaluate the claim against its insured, and to inform its insured of all settlement offers and negotiations. *See* ***Baker v. Northwestern Nat'l Cas. Co.***, 26 Wis.2d 306, 310, 132 N.W.2d 493, 496 (1965), *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.,*** 200 Wis.2d 559, 576, 547 N.W.2d 592, 598 (1996). The insurer uses its judgment and experience in deciding whether to settle or contest a claim. ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis.2d 496, 510, 385 N.W.2d 171, 178 (1986). However, for it to be made in good faith, "a decision not to settle a claim must be based on a thorough evaluation of the underlying circumstances of the claim and on informed interaction with the insured." ***Id.***

In order to establish the tort of bad faith, the insured must demonstrate the absence of a reasonable basis for denying policy benefits and the insurer's "knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." ***DeChant***, 200 Wis.2d at 578, 547 N.W.2d at 599 (quoting ***Anderson v. Continental Ins. Co.,*** 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978)). To satisfy the first prong, the insured must demonstrate that the reasonable insurer, given the same facts and circumstances, would neither delay nor deny payment of the claim. ***Id.*** The second prong may be satisfied by the inference of "a reckless disregard [or] a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured." ***Weiss***, 197 Wis.2d at 392, 541 N.W.2d at 762-63 (citation omitted).

Rural challenges the court's denial of its motion for a directed verdict on the bad faith claim. Because there is credible evidence in the record to support the bad faith claim, we disagree and affirm the court's decision.[3] The parties rely on the testimony of Lorenz's witnesses, Conway and Glaza, to support their bad faith arguments on appeal. We have reviewed their testimony and summarize it, in relevant part, below.

[3] Our conclusion here disposes of Rural's cross-appeal arguments that its motion for a directed verdict or judgment notwithstanding the verdict on the bad faith claim should have been granted because the evidence was insufficient to support a finding of bad faith.

Conway testified that Rural did not investigate and evaluate the claim properly. Specifically, Rural was not able to refute the testimony of several of Cottor's important experts and lay witnesses because it had not deposed them. Included were economist Michael Behr, whose report concluded that Cottor had sustained significant financial losses from the accident; Dr. Michael Olson, Cottor's treating chiropractor, who determined that Cottor had sustained a new injury in the accident; and two lay witnesses familiar with Cottor and his farming operation, who testified that Cottor's ability to farm after the accident was extremely different than before.

Conway also criticized Rural for its reliance on Cottor's preexisting back problems as a defense to its liability, in light of the testimony from medical experts that the accident had a significant new impact on Cottor's preexisting back condition, and the unrefuted testimony of Lorenz's engineering expert that the structure was improperly designed and constructed by Lorenz.

Conway also testified that Rural's damages evaluation significantly underestimated Cottor's costs and losses, and described Rural's failure to admit Lorenz's negligence until two years after the accident as unacceptable because it needlessly dragged out the claim. Conway specifically criticized Rural's failure to reevaluate the claim upon the occurrence of several events, including the court's decision not to submit the question of Cottor's negligence to the jury and the impeachment of Rural's economic expert on the stand. Finally, Conway criticized the failure of Rural's trial attorney to be in contact with Rural during the trial, and communicate adequately with Lorenz and his attorney about settlement demands and other developments in the case.

Glaza testified that Rural's investigation of the claim was inadequate because Rural did not follow-up the claim and adjust or increase its initial reserve of $20,000 as the claim developed. He criticized Rural's failure to depose Cottor's experts and to advise Lorenz and Wachs of the developments at trial. Glaza testified that Rural failed to pursue settlement of the case.

Glaza testified that Rural's decision to pursue the issue of Cottor's negligence in the accident was not reasonable. He criticized Rural for not having an insurance representative present at trial and not communicating with Lorenz and Wachs at the time of trial. Glaza testified that his impression was

that hard feelings between Rural and Cottor's attorney's law firm "clouded the judgment" of Rural with regard to this file. Glaza testified that Rural significantly disregarded Lorenz's rights and economic interests.

After hearing the testimony of Conway and Glaza, the jury could have found that Rural acted in bad faith by not conducting sufficient discovery, not adequately reevaluating the case as more information became available, and by not accepting Cottor's offers to settle the case within the policy limits. Construing the evidence in the light most favorable to Lorenz, the jury could have inferred that Rural had no reasonable basis to deny payment of the claim or to fail to settle the case and that in doing so, Rural acted with reckless disregard or indifference to Lorenz's rights and interests. Because there is credible evidence in the record to support the bad faith claim, we affirm the court's decision to deny Rural's motion for a directed verdict.

PUNITIVE DAMAGES

Lorenz argues that the court erred when it granted a directed verdict on the punitive damages claim because there was credible evidence to support it. Punitive damages may be awarded at the jury's discretion when the plaintiff proves its bad faith claim against its insurer and the jury has awarded actual damages on the bad faith claim.[4] *See* WIS J I—CIVIL 1707. The purpose of punitive damages is to punish and deter the wrongdoer's outrageous conduct. ***Anderson***, 85 Wis.2d at 697, 271 N.W.2d at 379.

Punitive damages are appropriate only when there are "aggravating circumstances beyond ordinary negligence," necessitating "the added sanction of a punitive damage [award] to deter others from committing acts against human dignity." ***Lievrouw v. Roth***, 157 Wis.2d 332, 343, 459 N.W.2d 850, 853 (Ct. App. 1990) (citations omitted). According to our supreme

[4] It is undisputed that actual damages of $177,634.48, together with costs and disbursements, were awarded to Lorenz.

court in ***Anderson***, punitive damages in a bad faith claim are warranted "only where the wrong was inflicted 'under circumstances of aggravation, insult or cruelty, with vindictiveness or malice.'" ***Id.*** at 697, 271 N.W.2d at 379 (quoting ***Mid-Continent Refrig. Co. v. Straka***, 47 Wis.2d 739, 747, 178 N.W.2d 28, 32 (1970)).[5]

The ***Anderson*** court expressly noted a distinction between the intent or malice necessary to maintain a bad faith action and the intent required to warrant punitive damages. ***Id.*** An award of punitive damages must be supported by "a showing of an evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct." ***Id.*** "For punitive damages to be awarded, a defendant must not only intentionally have breached his duty of good faith, but in addition must have been guilty of oppression, fraud, or malice in the special sense defined by ***Mid-Continent v. Straka***." ***Id.***

However, punitive damages may be awarded for outrageous conduct that falls short of malicious conduct. ***Wangen v. Ford Motor Co.***, 97 Wis.2d 260, 267, 294 N.W.2d 437, 442 (1980). Conduct warranting punitive damages also occurs when "the defendant knows, or should have reason to know, not only that his conduct creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences." ***Loveridge v. Chartier***, 161 Wis.2d 150, 188, 468 N.W.2d 146, 159 (1991) (citation omitted).

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[5] In Wisconsin, punitive damages have been assessed against insurance companies for acting in bad faith. *See* ***Davis v. Allstate Ins. Co.***, 101 Wis.2d 1, 10, 303 N.W.2d 596, 600-01 (1981) (the insurer's disagreement with a property valuation that was consistent with its agent's initial valuation was sufficient to support punitive damages); ***Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mut. Ins. Co.,*** 146 Wis.2d 470, 483, 431 N.W.2d 689, 695 (Ct. App. 1988) (upholding the jury's punitive damages award because of sufficient evidence that the denial of the insured's claim was based on grounds known by the insurer to be false, the insurer's investigators knowingly destroyed possibly crucial evidence, and the insurer lied in its investigation); ***Poling v. Wisconsin Physicians Service***, 120 Wis.2d 603, 611, 357 N.W.2d 293, 298 (Ct. App. 1984) (affirming the punitive damages award based on the insurer's "waffling" as to the grounds for denying coverage, its ultimate selection of the incorrect grounds to deny coverage, and the impeachment of the insurer's principal witness on the date of production of an expert's report).

In ***Weiss***, the court rejected the insurer's argument that its conduct did not warrant punitive damages because it did not rise to the level of the conduct described in ***Anderson***. According to the ***Weiss*** court, "[t]o sustain an award for punitive damages, the law does not require a specific finding of an intentional and ruthless desire to injure, vex or annoy. The injured party need show only a wanton, willful or reckless disregard of the rights of others on the part of the wrongdoer." ***Id.*** at 397, 541 N.W.2d at 765 (quoting ***Fahrenberg v. Tengel***, 96 Wis.2d 211, 221, 291 N.W.2d 516, 521 (1980)).

Any perceived discrepancy in the case law was addressed by the enactment of § 895.85(3), STATS., which provided a statutory standard for punitive damages awards. According to the statute, "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." Section 895.85(3), STATS. However, because § 895.85(3) applies only to civil actions commenced on or after May 17, 1995, it does not affect Lorenz's bad faith lawsuit.

Instead, the jury was properly instructed that it could award punitive damages if Rural's conduct was "outrageous," defined in the jury instruction as action taken "either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights." *See* WIS J I—CIVIL 1707. We recognize that the "reckless disregard of plaintiff's rights" language is common to the test for bad faith and the test for punitive damages. However, this does not mean that punitive damages are necessarily warranted every time the plaintiff proves bad faith. When the court submits a punitive damages question to the jury, the jury is instructed as follows:

> A plaintiff is not entitled to punitive damages as a matter of right. Even if you find that the defendant acted maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights, you do not have to award punitive damages. Such damages may be awarded or withheld at your discretion.

Id. Punitive damages are appropriate in a bad faith claim when the insurer's conduct has risen beyond ordinary bad faith to outrageous conduct, showing a

"[r]eckless indifference to the rights of others and conscious action in deliberate disregard of them." ***Fahrenberg***, 96 Wis.2d at 221, 291 N.W.2d at 521 (citation omitted).

Lorenz asserts that the punitive damages award was supported by credible evidence. We agree. After searching for evidence to sustain the jury's verdict, drawing the inferences presumably drawn by the jury in arriving at that verdict, and viewing the evidence in the light most favorable to Lorenz, we conclude that there is credible evidence to support the jury's punitive damages award.[6]

Lorenz's theory was that Rural failed to investigate and evaluate the claim, make reasonable settlement offers, and adequately communicate with him. Rural did not depose Cottor's lay and expert witnesses, whose testimony at trial damaged Lorenz's case. Included was economist Michael Behr, whose complex economic report concluded that Cottor sustained significant present and future financial losses as a result of the accident. Conway testified that the report was not self-explanatory and that it was impossible to understand how Behr arrived at his numbers without questioning him about the report. From Conway's testimony, the jury could have concluded that Rural failed to take reasonable steps to investigate the claim in reckless disregard of Lorenz's rights and interests.

Rural's strategy was to argue to the jury that Cottor was contributorily negligent in the accident, and that the accident resulted in no new injury to Cottor because of his numerous and significant prior injuries and his preexisting back condition. However, the court decided that the issue of contributory negligence would not go to the jury, in light of unrefuted testimony by Cottor's engineering expert that the grain storage structure was improperly designed and constructed by Lorenz.

Medical experts testified to the seriousness of the injury sustained by Cottor in the accident. Contrary to his written report, the subsequent videotaped deposition testimony of Dr. Bruce Van Dyne, the physician who

[6] Our conclusion here disposes of Rural's argument that the judge should have granted its postverdict motion for a judgment notwithstanding the verdict on the issue of punitive damages.

conducted the independent medical examination of Cottor, indicated that Cottor had sustained a new and permanent injury from the accident, and that he would need physical therapy several times per week for the rest of his life to treat the injury. As Bell testified, the Van Dyne videotape was so favorable to Cottor that Bell used it as part of his evidence.

Rural presented the testimony of vocationalist Deborah Mathson and agricultural economist Vern Elefson. According to Bell's testimony, Mathson had not seen Van Dyne's videotaped deposition before she took the stand, and did not know until Bell told her on cross-examination that Van Dyne had testified that Cottor received permanent injuries from the accident. Elefson testified regarding Cottor's loss of earning capacity, basing his conclusions exclusively on Cottor's tax returns. He was impeached with his own testimony from another case that tax returns were a totally unreliable basis from which to determine the profitability of a farming operation. Even Rural's attorney described Elefson's testimony as a disaster.

Nevertheless, Rural refused Cottor's offers to settle within the policy limits, the last of which was made as the jury deliberated. After hearing testimony regarding these developments, the jury could have concluded that Rural's conduct was outrageous because it knew or should have known that there was an unreasonable risk of an excess verdict, and yet Rural did not settle the case. Although Rural's conduct was not malicious, there was evidence from which the jury could have concluded that Rural knew or should have had reason to know, not only that its conduct created an unreasonable risk of an excess verdict, but also that there was a strong probability, although not a substantial certainty, that the excess verdict would result but, nevertheless, Rural failed to settle the case in reckless or conscious disregard of the consequences. *See* ***Loveridge***, 161 Wis.2d at 188, 468 N.W.2d at 159.

Next, Rural asserts that it was prejudicial to submit the punitive damages question to the jury. This is a question of law that we review de novo. ***Lievrouw***, 157 Wis.2d at 344, 459 N.W.2d at 853-54. The trial court should not submit the punitive damages question to the jury if there is no evidence "warranting a conclusion to a reasonable certainty" that the wrongdoer engaged in outrageous conduct. ***Id.*** (citation omitted). Because there was credible evidence to support the punitive damages award, we conclude that the trial court's submission of the question was neither erroneous nor unduly prejudicial to Rural.

CROSS-APPEAL ISSUES

Rural argues that its motions for summary judgment and reconsideration should have been granted because the undisputed facts established a defense to the negligence and bad faith claims and Lorenz lacked the requisite expert testimony to establish bad faith. Rural also challenges on procedural and substantive grounds the sufficiency of an affidavit submitted by Lorenz to support his bad faith claim. We reject Rural's arguments and agree that the court properly denied the motions.

We review summary judgments do novo. ***Universal Die Stampings, Inc. v. Justus***, 174 Wis.2d 556, 560, 497 N.W.2d 797, 799 (Ct. App. 1993). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS. A complaint should be dismissed as legally insufficient only if it is clear that under no circumstances can the plaintiff recover. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 317, 401 N.W.2d 816, 821 (1987).

Because summary judgment is a drastic remedy, any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the granting of the motion. *See* ***Heck & Paetow Claim Serv. v. Heck***, 93 Wis.2d 349, 356, 286 N.W.2d 831, 834 (1980). If the evidence is subject to different interpretations or reasonable people may disagree about its significance, summary judgment should not be granted. ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980).

We conclude that the court properly denied summary judgment because material facts were in dispute regarding the steps taken by Rural to investigate and evaluate the claim, and to inform Lorenz of developments in the case and settlement negotiations. Reasonable people could disagree as to the significance of these facts, including the testimony of the lay and expert witnesses, Rural's decision not to depose Cottor's witnesses, Rural's rejection of Cottor's settlement offer, and Rural's offer of judgment in the amount of $90,000, which did not change as the case developed.

Rural argues that the court should have granted its motion for reconsideration because Lorenz did not present the requisite expert testimony to prove its bad faith claim. Rural challenges the sufficiency of and the procedural steps taken by the court with regard to an affidavit submitted by Lorenz. Expert testimony is not required to establish a prima facie bad faith claim when the claim "involves facts and circumstances within the common knowledge or ordinary experience of an average juror." ***Weiss***, 197 Wis.2d at 382, 541 N.W.2d at 758-59. Because we are not persuaded that this case presented "unusually complex or esoteric" insurance issues that were beyond the understanding of the average juror, we reject Rural's argument and conclude that the court properly denied the motion for reconsideration. *See* ***id.*** at 382-83, 541 N.W.2d at 759.[7]

Rural also argues that the court should have granted its motion for disqualification because attorney Bell represented Cottor in the underlying personal injury case, and then represented Lorenz in the subsequent bad faith case against Rural. Cottor agreed to delay execution of his judgment against Lorenz in exchange for an assignment of any proceeds from Lorenz's bad faith claim against Rural. Rural argues that this presented a conflict of interest prohibited by SCR 20:1.7, sufficient to disqualify Bell and his law firm from representing Lorenz. We reject this argument.

A motion to disqualify an attorney on the grounds of conflict of interest is addressed to the sound discretion of the trial court, and we will uphold the court's discretionary decision if we conclude there is a reasonable basis for it. *See* ***Berg v. Marine Trust Co.***, 141 Wis.2d 878, 887, 416 N.W.2d 643, 647 (Ct. App. 1987). In order to be subject to disqualification, an attorney must first "represent[] a party in a matter in which the *adverse* party is that attorney's former client." ***Id.*** at 885, 416 N.W.2d at 647 (citation omitted) (emphasis added).

The court decided that because the interests of Lorenz and Cottor were not directly adverse, there was no conflict of interest to preclude Bell and

[7] Because we conclude that expert evidence was not necessary to establish Lorenz's bad faith claim, we do not address Rural's procedural and substantive arguments regarding the sufficiency of the expert's affidavit submitted by Lorenz. Even without expert testimony from Conway or Glaza, there was sufficient evidence in the record upon which summary judgment was properly denied.

his firm's representation of Lorenz in the bad faith claim. We agree. Whereas Rural's interests were adverse to those of Cottor in the personal injury case, and adverse to those of Lorenz in the bad faith lawsuit, Cottor's interests in the bad faith claim were not adverse to Lorenz's, nor were Lorenz's interests adverse to Cottor's. We conclude that the absence of adverse interests was a reasonable basis for the denial of the motion.[8]

In a related argument, Rural asserts that Bell should have been disqualified under SCR 20:3.7, the lawyer-as-witness rule. This argument is meritless. The rule prohibits a lawyer from acting "as advocate at a trial in which the lawyer is likely to be a necessary witness," with several exceptions. The rule also permits a lawyer to "act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Because Drill from Bell's firm was trial counsel, and no violation of SCR 20:1.7 or 1.9 occurred by a conflict of interest, we reject Rural's argument.

Next, Rural asserts that the court should have granted its request for a hearing regarding jury intent in setting the verdict. After the verdict, eight jurors submitted identical affidavits, stating the following:

> In answering the Special Verdict on Bad Faith and punitive damages, it was my understanding that the total monetary award which would be given to Timothy L. Lorenz for the excess judgment in the prior case and for punitive damages was to be a total of One Hundred Ten Thousand and No/100 Dollars ($110,000.00), plus costs.

The first step in determining whether a jury verdict may be impeached is to determine whether the evidence offered is competent. ***State v. Heitkemper***, 196 Wis.2d 218, 223, 538 N.W.2d 561, 563 (Ct. App. 1995). If the proffered juror testimony is not competent, no further inquiry is necessary. ***Id.***

[8] Because we have not found a conflict of interest in the assignment, we do not address the issue of the imputed disqualification of Bell's firm, nor do we address Rural's argument that it was denied discovery related to the assignment and the circumstances by which representation of Lorenz was transferred to Bell and his firm.

at 224, 538 N.W.2d at 563. Section 906.06(2), STATS., sets the standard for determining whether the evidence presented is competent. According to the statute,

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Rural has failed to meet its burden to demonstrate that the jury considered extraneous information or that improper outside influence affected the jury. *See* ***State v. Poh***, 116 Wis.2d 510, 520, 343 N.W.2d 108, 114 (1984). In fact, neither party asserts that any extraneous information existed or that improper influence was brought to bear on the jurors. In the absence of extraneous information or outside influence, as required by ***Poh***, we conclude that the affidavits were not competent evidence, pursuant to § 906.06(2).

Rural relies on ***State v. Williquette***, 190 Wis.2d 677, 526 N.W.2d 144 (1995), to support its argument. In ***Williquette***, the defendant was charged with two counts of sexual assault, each to a separate victim. ***Id***. at 681, 526 N.W.2d at 145. The jury inadvertently returned a guilty verdict on the second count and a not guilty verdict on the first count, when it had intended to do just the opposite. Our supreme court decided that the jurors were competent to testify about this clerical error in the verdict. ***Id***. at 683, 526 N.W.2d at 146.

This case is distinguishable because the jurors did not make a clerical error in their verdict. Instead, their affidavits indicate that they misunderstood the consequence of their verdict. They did not understand that Lorenz would receive any money they awarded in addition to any money he recovered on the bad faith claim. Because Rural did not establish that the

affidavits were competent evidence, we conclude that the court properly struck the affidavits and denied the hearing.

Next, Rural argues the court should have granted its post-verdict motion for a new trial in the interest of justice. We disagree. We possess the discretionary power to reverse the judgment "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried ...." *See* § 752.35, STATS. A new trial in the interest of justice is warranted whenever the real controversy has not been fully tried, or whenever it is probable that justice has for any reason miscarried and there is a substantial probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797, 804 (1990). Because both parties submitted a substantial amount of evidence during a four-day trial to a properly instructed jury, we conclude that the bad faith claim was fully tried. Although the jury drew inferences and conclusions adverse to Rural's interests, we are persuaded that the trial resolved the controversy at issue and no miscarriage of justice resulted. Rural has not demonstrated the likelihood of a different result on retrial. Therefore, no new trial is warranted.

In conclusion, we have determined that there was credible evidence to support Lorenz's bad faith claim and the award of punitive damages. We reject the remainder of Rural's appeal and cross-appeal arguments. We affirm the court with respect to all of its decisions except to grant Rural a directed verdict on the punitive damages award.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions to reinstate the jury's punitive damages award. Costs to Lorenz.

Not recommended for publication in the official reports.