COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0202

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

JOHN A. DAVIS,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Polk County: EDWARD R. BRUNNER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. John Davis appeals from a judgment, entered after a jury trial, dismissing his bad faith claim against American Family Mutual Insurance Company for damages he contends he suffered when American Family

denied his claim for underinsured motorist coverage. Davis argues that he is entitled to a new trial because the trial court erroneously admitted evidence that, Davis claims, was irrelevant and "inflame[d] juror[s'] passions against Davis." We reject Davis' arguments and affirm the judgment.

BACKGROUND

¶2 This is the second time we have considered this case. We previously vacated a summary judgment dismissing Davis' case on the basis of claim preclusion and judicial estoppel and remanded to the trial court for further proceedings. *See* ***Davis v. American Fam. Mut. Ins. Co.***, 212 Wis. 2d 382, 569 N.W.2d 64 (Ct. App. 1997). Our first opinion summarized the pertinent background facts:

> On October 8, 1989, Davis was injured in a one vehicle accident in Hennepin County, Minnesota, in a vehicle driven by James Goutanis. State Farm Insurance Company insured the Goutanis vehicle for $100,000/$300,000 liability. Davis settled the liability portion of his claim with State Farm for $77,500, or $22,500 less than the policy limits.
>
> Davis then claimed underinsured motorist benefits from his insurance provider, American Family. Davis was insured by American Family under a policy issued to his father, James Davis. The policy was issued in Wisconsin and James Davis lived in Wisconsin. American Family denied the claim, and Davis sued American Family in Minnesota, pursuant to Minnesota law permitting an insured to sue for underinsured motorist benefits after accepting an amount less than the policy limits from a liability carrier. Davis' claim against American Family for underinsured motorist benefits was precluded by Wisconsin law because he settled the liability portion of the claim for an amount less than Goutanis' policy limits. *See* ***American Family Mut. Ins. Co. v. Powell***, 169 Wis.2d 605, 608, 486 N.W.2d 537, 538 (Ct. App. 1992).
>
> The Minnesota court granted Davis' motion for summary judgment, deciding that Davis was entitled to underinsured motorist coverage under American Family's policy. After a

> trial on damages, the jury returned a verdict in the amount of $378,828.96. Judgment for Davis was entered in the amount of $100,000 plus costs, disbursements and post-judgment interest.[1]
>
> On January 31, 1995, Davis commenced a bad faith action against American Family in Wisconsin, asserting that American Family acted in bad faith when it denied Davis' claim for underinsured motorist coverage. American Family moved for a stay of the proceedings pursuant to § 801.63, STATS., to move the proceedings to Minnesota. The trial court granted the motion. …
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> ….
>
> On May 15, 1996, the Hennepin County court dismissed Davis' lawsuit because the tort of bad faith is not recognized in Minnesota.
>
> On November 12, 1996, the parties argued American Family's summary judgment motion in Wisconsin. The court granted summary judgment to American Family, deciding Davis' bad faith cause of action was barred by the principles of claim preclusion, fundamental fairness and judicial estoppel.

Id. at 385-88 (footnotes omitted). Davis appealed the summary judgment. This court reversed the judgment and remanded the case for further proceedings. *See* ***id.*** at 392.

¶3 In 1999, the case proceeded to trial. Davis argued that American Family was liable for bad faith because it denied Davis' claim for underinsured motorist benefits for over three and a half years after first being notified of the claim. Davis contended that the issues American Family raised during this time period were not fairly debatable defenses. The issues American Family raised when the claim was presented were: (1) whether Davis was living in the insured's household at the time of the accident; (2) whether Davis was a relative as defined in his father's policy even though he owned a car and a motorcycle; (3) whether

[1] American Family satisfied this judgment in October 1994.

Goutanis was liable for the accident that injured Davis; (4) whether Davis was contributorily negligent because he was not wearing a seatbelt and should have known Goutanis was too intoxicated to drive; (5) whether Davis' damages were sufficient to trigger underinsured motorist coverage; and (6) whether Davis could recover underinsured motorist benefits after accepting less than State Farm's $100,000 policy limits.

¶4 During the course of the trial, the court allowed American Family to introduce evidence that Davis argued was irrelevant and unfairly prejudicial. Ultimately, the jury answered in the negative the first of four questions on the special verdict: "Did American Family Insurance Company exercise bad faith in handling the claim of John A. Davis?"[2] Davis moved the trial court for judgment notwithstanding the verdict and, in the alternative, a new trial. The trial court denied the motions and entered judgment for American Family.

¶5 On appeal, Davis raises a single issue: whether he is entitled to a new trial based on erroneously-admitted evidence. We conclude that the evidence was properly admitted and, therefore, affirm the judgment. In the alternative, we conclude that even if the trial court erroneously admitted any evidence, the error was harmless.

LEGAL STANDARDS GOVERNING FIRST PARTY BAD FAITH CLAIMS

¶6 An insurance policy is a unique contract in which an "insurer has a special 'fiduciary' relationship to its insured which derives from the great disparity in [their bargaining positions]." ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d

[2] Because the jury answered the first question in the negative, it correctly did not answer additional questions pertaining to damages.

559, 570, 547 N.W.2d 592 (1996). "It is well-settled that if an insurer fails to deal in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for bad faith." ***Id.*** at 569.

¶7 The underinsurance contract carries with it an obligation to investigate, evaluate and make a good faith effort to negotiate a claim. *See* ***Rhiel v. Wisconsin County Mut. Ins. Corp.***, 212 Wis. 2d 46, 52-53, 568 N.W.2d 4 (Ct. App. 1997). To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying policy benefits and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 626, 345 N.W.2d 874 (1984).

¶8 An insurance company, however, may "challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis." ***Id.*** A claim is defined as fairly debatable where a genuine dispute over the status of the law or fact exists at the time the denials were made. ***Madsen v. Threshermen's Mut. Ins. Co.***, 149 Wis. 2d 594, 614, 439 N.W.2d 607 (Ct. App. 1989). In a case where a claim was not fairly debatable, refusal to pay would be bad faith and, under appropriate facts, could give rise to an action for tortious refusal to honor the claim. ***Radlein***, 117 Wis. 2d at 626.

STANDARD OF REVIEW

¶9 The admission of evidence lies within the sound discretion of the circuit court. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). When we review a discretionary decision, we examine the record to determine if the trial court logically interpreted the facts, applied the proper legal

standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997). In considering whether the proper legal standard was applied, however, no deference is due. ***Id.*** Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial. *See* ***id.***

DISCUSSION

¶10 Davis argues that the trial court erroneously admitted evidence from a variety of sources that was irrelevant and "inflame[d] juror[s'] passions against Davis." However, as American Family notes in its brief, Davis has alleged very few specific errors. Instead, he presents many of his objections in a conclusory fashion, without citations to the record or full development of the arguments. We will briefly address the three primary categories of evidence to which Davis objects: (1) admission of some handwritten notes from Davis' Minnesota attorney; (2) admission of medical, ambulance and police reports; and (3) "[t]he entirety of Davis' testimony" (Davis was called adversely by the defense).

¶11 At the outset, we note that Davis contends much of the evidence was irrelevant because it was unavailable to American Family at the time it denied Davis' claim. We acknowledge that whether an issue is fairly debatable is based upon the information available to the insurance company at the time the demand is presented. *See* ***Rhiel***, 212 Wis. 2d at 53-54. In this case, however, the evidence to which Davis objects was, in each instance, either available to American Family or properly admitted for other valid purposes.

A. Handwritten notes from Davis' first attorney

¶12 Davis argues that the trial court erroneously admitted into evidence handwritten notes from Davis' attorney in Minnesota, Timothy Sempf. The notes were taken when Davis' mother first contacted Sempf, on behalf of her son, with respect to the accident. Most significantly, the notes contain the phrase "lives in Dresser[, Wisconsin]." Davis claims that admission of this phrase was improper because it allowed American Family to re-try the issue whether Davis was a resident of his father's household in St. Croix, Wisconsin.[3] In response, American Family argues the notes were properly admitted for several reasons, including impeachment of Sempf's testimony.

¶13 Sempf was allowed to testify, over American Family's objection, about his thought process at the time he analyzed Davis' claim. On cross-examination, American Family sought to impeach Davis' testimony by questioning whether Sempf himself should have had reason to question Davis' residency in light of the mention of Dresser in Sempf's notes. The trial court allowed this cross-examination and later put its reasoning on the record:

> [I]t is relevant in this course of conduct what Mr. Sempf thought, what others thought. … [Davis] brought it up on [his] direct with Mr. Sempf, it came in and I suspect that [the jury is] entitled to hear how all the parties were thinking of these issues, of all the possible reasons for denial or granting this claim. … we don't have to retry the case, but they do have to understand how this case unfolded and this is part of the nature of the unfolding of the issues.

[3] At trial, Davis also argued the notes were inadmissible as attorney work product. Because Davis has not raised that issue on appeal, we do not address it.

¶14 Although the trial court did not explicitly state that it was allowing the evidence for impeachment purposes, we infer that was the basis for the admission. In any event, we conclude the evidence could have been properly admitted for impeachment purposes. If a party's expert relies on certain data, fair play requires that the opponent may show that the data relied on did not support the conclusions of the testifying expert, or that the data relied on contained information ignored by the testifying expert. ***Karl v. Employers Ins.***, 78 Wis. 2d 284, 300, 254 N.W.2d 255 (1977). In such cases, the facts relied on by the expert may be admitted for the limited purpose of impeachment and verbal clarity. *See* ***id.***

¶15 Although Sempf was not designated an expert witness, we agree with American Family that he was, in effect, allowed to offer his opinion as to how a reasonable attorney would have viewed Davis' potential claims. In his closing argument, Davis likened Sempf's representation to a David versus Goliath battle against American Family. Davis stated that Sempf

> knew what the facts were. He knew what the law was and he was met with all of the stuff that you've heard about, all of these defenses and he persisted. He did a workmanlike job for his client. … He didn't do it with magic, he did it because he had the facts.

In light of Sempf's testimony and how Davis ultimately used it in the closing argument, it was reasonable for the trial court to allow limited cross-examination of Sempf, using Sempf's notes from his first contact with Davis' mother.

¶16 We also note that if Davis was concerned the jury would consider Sempf's notes for something other than impeachment purposes, he could have

requested an instruction limiting the jury's consideration of the notes to that purpose. He did not do so.

B. Ambulance, medical and police reports

¶17 Next, Davis contends that the trial court erroneously admitted ambulance, medical records and police reports listing Davis' address as Dresser, Wisconsin, rather than St. Croix, Wisconsin, where his parents lived. Davis states, "Not a single piece of this evidence was available to American Family at the time it denied Davis' claim." Conversely, American Family states that it possessed police reports and medical records.

¶18 We note that Davis has not identified the specific reports to which he is objecting. Furthermore, we have independently reviewed the record and have found an exhibit, included in Davis' own appendix, that contradicts Davis' contention. In an April 10, 1991, internal memo, an American Family claims manager wrote,

> I still have some questions as to residency even though our named insured said he was there at the time. See the bills that they submitted as we get 2 addresses in Dresser and some of the bills come to Route 7 and one on Main Street in Dresser and then there is another bill that has Mahtomedi, Minnesota.

¶19 Clearly, whether American Family possessed the reports in question is a disputed issue of fact. Davis has not provided this court with record citations that would aid us in determining whether the trial court resolved this factual issue. Accordingly, we need not consider further Davis' argument that admission of the reports constitutes grounds for a new trial. *See* ***State v. Lass***, 194 Wis. 2d 591,

604, 535 N.W.2d 904 (Ct. App. 1995) (We will not consider arguments that are not supported by appropriate references to the record.).

C. Davis' testimony

¶20 Finally, we consider Davis' argument that all of his testimony was irrelevant. Davis did not testify in his case in chief. Instead, American Family sought to introduce his evidentiary deposition, which included testimony on a variety of issues such as how Davis disposed of the funds he was awarded in Minnesota and whether he had ever been convicted of a crime.

¶21 At trial, Davis argued his testimony was irrelevant to the information that American Family relied on in making its determination to deny the claim. Davis also claimed that it would be unfairly prejudicial to show the jury his videotaped deposition because it was taken while he was incarcerated and wearing prison clothes. The trial court concluded:

> I've considered a number of things in making the decision on this. First of all, as both of you know, relevant evidence means evidence having a tendency to prove the existence of any fact that is … of consequence to the determination of the action. … Clearly residency is an issue here, whether you put it in as a fact of where he lives or a fact that you are claiming that their pursuing it to summary judgment is bad faith.
>
> It's an issue and it's been discussed over and over again, and I don't think that there is anything that would prevent this from being relevant coming from the mouth of the plaintiff … And, as I understand it … there was very little in [the deposition] about residency.
>
> With regard to the issue of finances, it's clear that you're asking damages, and his financial situation and the other settlement and all the things that go with it are relevant to this issue of damages.

The trial court did, however, agree that the videotape should not be played. Instead, the deposition was read to the jury, so the jury never learned that Davis was currently incarcerated.

¶22 We conclude that the trial court did not erroneously exercise its discretion when it allowed Davis' testimony. For instance, Davis' testimony about how he spent over $100,000 in funds he received from the insurance proceeds is relevant to the issue of damages. Davis' own expert on damages, Frederic Kolb, provided the jury with five methods of calculating Davis' damages, each based on what Davis could have done with the money if he had been paid sooner. For example, Kolb suggested that Davis could have invested the money in a money market account or stocks.

¶23 On cross-examination, Kolb acknowledged that what Davis did with the money when he ultimately received it was something for the jury to consider in determining damages. He answered in the affirmative when asked whether what Davis did with the money in the past "would be a predictor of what he would have done with the funds had he got them earlier." In short, Davis' own expert suggested how and when Davis spent the judgment money was relevant to the jury's determination of his loss for having received the money several years after he made his claim. Accordingly, the trial court reasonably concluded that Davis' testimony concerning how he spent the judgment money was relevant.

¶24 Finally, Davis was asked whether he had ever been convicted of a crime. He answered that he had been convicted five times. Pursuant to WIS. STAT. § 906.09,[4] the general rule is that evidence a witness has been convicted of a

[4] All statutory references are to the 1999-2000 version.

crime is admissible for the purpose of attacking the witness' credibility. We are unpersuaded that the trial court erred in applying the rule here.

¶25 In summary, we are unconvinced that the trial court erroneously exercised its discretion when it admitted Sempf's notes, reports listing Davis' address, and Davis' testimony. Moreover, as American Family argues, even if the trial court erred by admitting any of the challenged evidence, a new trial is not warranted because the error was harmless.

D. Harmless Error

¶26 Evidentiary error does not necessarily require reversal. ***Heggy v. Grutzner***, 156 Wis. 2d 186, 196, 456 N.W.2d 845 (Ct. App. 1990). We may not reverse or order a new trial on the ground of improper admission of evidence unless the error has affected substantial rights of the party seeking relief on appeal. WIS. STAT. § 805.18(2); ***Heggy***, 156 Wis. 2d at 196. Reversal is not required unless there is a reasonable probability that the error contributed to the final result. ***Heggy***, 156 Wis. 2d at 197.

¶27 We agree with American Family's argument that even if the trial court erroneously admitted any evidence, the error was harmless. There is ample evidence to support the verdict, and Davis does not challenge the sufficiency of the evidence on appeal.

¶28 It is unlikely that the admission of Sempf's notes contributed to the final result. Sempf's notes contained only a single objectionable phrase "lives in Dresser." There was substantial other evidence in the record to demonstrate that Davis' residency was fairly debatable, including police, medical and ambulance reports that mentioned the Dresser address. Finally, American Family notes that

Davis does not challenge the admission of another document from Sempf's file, dated April 17, 1991, in which Sempf advised his client that "we may not be able to get into the Underinsured Motorist Coverage because we have the difficulty in showing that you were a resident of the household." Thus, even without the admission of Sempf's notes, the jury would still have heard Sempf express doubts about the viability of Davis' case.

¶29 Any error involved in the admission of evidence regarding Davis' financial situation was also harmless. We agree with American Family's analysis:

> As Davis repeatedly notes, much of that evidence did not relate to the question of whether American Family acted in bad faith; the evidence regarding his spending … and his child support debt pertained only to Davis' damages from the alleged bad faith. Since the jury found no bad faith in the first instance, any error regarding the admission of evidence on bad faith damages [was harmless].

¶30 Finally, with respect to Davis' testimony, we note once again that Davis has not specifically explained how particular alleged errors unfairly prejudiced his case. We decline to make his arguments for him. *See* ***In re Balkus***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985). Having reviewed the entire record, we are unconvinced that there is a reasonable probability that any alleged errors contributed to the final result. Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.