COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-0505

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

WISCONSIN PATIENTS COMPENSATION FUND,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed in part; reversed in part.*

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

¶1 HOOVER, P.J. Physicians Insurance Company of Wisconsin, Inc., appeals a judgment entered against it finding a breach of its fiduciary duty to represent Wisconsin Patients Compensation Fund's interests in a medical malpractice lawsuit. Physicians raises eight issues relating to sufficiency of the evidence, admissibility of certain evidence, and the award of attorney fees, costs and interest. The Fund cross-appeals the circuit court's decision to deny interest on attorney fees under WIS. STAT. § 807.01(4).[1] We affirm the circuit court with one exception: We reverse its decision to award the Fund attorney fees and costs incurred to prepare and present its motion seeking attorney fees and costs.

PROCEDURAL BACKGROUND

¶2 This case concerns Physicians' handling of a medical malpractice claim. David and Patricia Maxon filed the claim against Dr. Neal Melby for negligence that led to the death of their twenty-three-month-old son. Physicians insured Melby for medical malpractice claims up to a $400,000 liability limit, the minimum required by WIS. STAT. § 655.23(4)(b)1b at the relevant time. The Fund provided excess coverage, as explained more fully below.

¶3 The jury concluded on February 9, 1995, that Melby had been negligent in his medical treatment of the child and awarded the parents $1,040,000 in loss of society and companionship. The Maxons had not sought other damages.

¶4 Following the jury verdict, the Fund sued Physicians for breach of fiduciary duty and bad faith, claiming damages of $640,000. Because Physicians'

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

arguments discuss the wording of and answers to the verdict questions, we quote them as follows:

> 1. Did Physicians Insurance Company of Wisconsin (PIC), acting through its representatives, breach its duty to the Patients Compensation Fund (the Fund) by not offering its policy limits in settlement of the Maxon claim?
>
> [The jury answered:] Yes.
>
> 2. If you have answered question 1 "yes," then answer this question: "Did PIC's failure to perform its duty to the Fund as found in Question 1 demonstrate such a significant disregard of the Fund's interests that PIC's final decision not to offer its policy limits to settle the case was made in bad faith?"
>
> [The jury answered:] Yes.
>
> 3. If you have answered question 2 "yes", then answer this question: Did PIC's decision not to offer its policy limits cause damages to the Fund?"
>
> [The jury answered:] Yes.
>
> 4. What sum of money will reasonably and fairly compensate the Fund for the loss it sustained as a result of PIC's decision not to offer its policy limits?
>
> [The jury answered:] $425,000.00.

The verdict form made no mention of attorney fees or costs.

¶5 After the trial, Physicians moved to change the jury's answers, for a new trial, to grant a mistrial, and for costs and fees under WIS. STAT. RULE 814.025. The court denied all of Physicians' motions. The Fund moved for reimbursement of attorney fees and costs as part of its damage award. The court approved the verdict with some limitations on the attorney fees. The court affirmed the judgment and awarded the Fund $425,000 (the jury verdict), $149,842 in pre-judgment interest (on the $425,000 from September 24, 1996, to January 4, 2000), $307,375.50 in attorney fees, $13,600 additional attorney fees for prosecuting its motion for attorney fees, and $75,444.30 in costs.

DISCUSSION

I. Legal Background

¶6 In Wisconsin, doctors are required to carry a minimum amount of malpractice insurance. WIS. STAT. § 655.23. If malpractice damages exceed the statutory minimum (or exceed a doctor's medical malpractice policy limit that is greater than the statutory minimum), a plaintiff may seek compensation from the Fund. WIS. STAT. § 655.27(1). In order to practice medicine in Wisconsin, health care providers like Melby are required to pay assessments to the Fund, which then functions like a trust fund for excess verdicts. WIS. STAT. § 655.27(1) and (3). The primary malpractice insurer has a duty to represent the Fund's interest during claim processing and resolution. WIS. STAT. § 655.27(5)(b).

¶7 Physicians' duties to the Fund are detailed in WIS. STAT. § 655.27(5)(b):

> It shall be the responsibility of the insurer or self-insurer providing insurance or self-insurance for a health care provider who is also covered by the Fund to provide an adequate defense of the Fund on any claim filed that may potentially affect the Fund with respect to such insurance contract or self-insurance contract. The insurer or self-insurer shall act in good faith and in a fiduciary relationship with respect to any claim affecting the Fund. No settlement exceeding an amount which could require payment by the Fund may be agreed to unless approved by the board of governors.

WISCONSIN STAT. § 655.27(7) grants the Fund's board of governors authority to bring an action against a health care provider's malpractice insurer for failure to act in good faith or breach of fiduciary duty.

¶8 This case differs from a standard excess insurer case between two insurers who have no fiduciary duty to one another. Although no contract binds Physicians to the Fund, by virtue of WIS. STAT. § 655.27 the Fund, like an insured, is owed a duty to resolve claims in good faith. Therefore, bad faith cases that insureds have brought against their insurers are instructive.

¶9 An insurer's fiduciary duty

> carries with it the duty to act on behalf of the insured and to exercise the same standard of care that the insurance company would exercise were it exercising ordinary diligence in respect to its own business. Since that is the accepted standard, an insurance company, in which is vested the exclusive control of the management of the case, breaches its duty when it has the opportunity to settle an excess liability case within policy limits and it fails to do so.
>
> … This duty is, of course, intimately related to its affirmative duty to investigate. A proper investigation should impel a response by the insurer and a determination of whether liability is clear and whether the exposure may jeopardize the insured by being in excess of the policy limits.

Alt v. American Fam. Mut. Ins. Co., 71 Wis. 2d 340, 348-49, 237 N.W.2d 706 (1976).

¶10 Indeed, Physicians agrees that the trial court properly defined Physicians' duty in the following jury instruction excerpt:

> If the insurer, on the basis of its investigation and evaluation of the claim, concludes, or, in the exercise of reasonable care, should conclude, that a verdict substantially in excess of its policy limits is probable, that is, more likely than not, the insurer has a duty to … make available its policy limits to … settle the case.

II. Sufficiency of the Evidence

¶11 The first three issues relate to whether the evidence supports the verdict. "A jury verdict will be sustained if there is any credible evidence to support the verdict, sufficient to remove the question from the realm of conjecture." ***Finley v. Culligan***, 201 Wis. 2d 611, 630, 548 N.W.2d 854 (Ct. App. 1996). This is particularly true when, as here, the trial court has approved the verdict. ***Id.*** at 630-31. Before we will reverse, we must conclude that the proof so completely fails that the verdict must have been based on speculation. ***Id.*** at 631. The jury is solely charged with determining the credibility of the witnesses and the weight to be afforded their testimony. ***Id.*** We consider the evidence in the light most favorable to the verdict, and when more than one inference may be drawn from the evidence, we are bound to accept the inference drawn by the jury. WIS. STAT. § 805.14(1); ***Finley***, 201 Wis. 2d at 631. Finally, it is our duty to search the record for credible evidence that supports the jury's verdict. ***Finley***, 201 Wis. 2d at 631.

a. Reasonable Valuation of the Claim

¶12 Physicians argues that the evidence does not support the jury's verdict regarding how a reasonable insurance company would have valued the claim. We reject its argument. Physicians' duty was to act reasonably under the circumstances in consideration of the Fund's interests. *See* WIS. STAT. § 655.27(5)(b); ***Alt***, 71 Wis. 2d at 348. Although Physicians introduced evidence that does not support the jury's verdict, we will not disturb the jury's credibility determination. *See* ***Finley***, 201 Wis. 2d at 631. The jury was entitled to believe testimony that supported its finding that a Physicians' claims committee

unreasonably disregarded evidence of a claim valuation in excess of the policy limits.

¶13 The Maxons first offered to settle for $400,000 during mediation in April 1994. The parties do not dispute, however, that it would have been unreasonable for Physicians to settle at this time, before any discovery had occurred. In July 1994, after suit was filed and some discovery had been completed, the Maxons offered to settle for $550,000. James Pelish, Physicians' and Melby's trial counsel, did not communicate this offer to the Fund until after it expired.[2] Settling at this amount would have required Physicians to contribute $400,000, its policy limits, and the Fund to contribute $150,000. The Fund admits that it was not prepared to pay that amount as of July 28, 1994.

¶14 On August 8, 1994, Pelish advised Physicians that based on the evidence to date, the case was worth anywhere from $200,000 to $600,000. On August 17, 1994, Thomas Champan, Physicians' claims representative, recorded in his progress notes: "Exposure is substantial for loss of society with no current cap." Champan increased Physicians' claim reserve from $60,000 to $400,000.

¶15 In mid-August 1994, [3] Champan sent the Fund a letter stating that Physician's exposure exceeded the policy limit. The letter did not reach Christopher Flatter, the Fund's representative, until August 24, 1994.

[2] The offer expired 10 days after receipt of the July 15, 1994, offer letter. Pelish admits that he did not communicate this offer until August 8, 1994.

[3] The letter is actually dated June 7, 1994, but all parties concede that this is a typographical error.

¶16 Champan wrote a claim summary report, dated September 1, 1994, to the Physicians' claims committee estimating that Melby has a "less than 50% chance of prevailing at trial" and that "[b]ased upon recent experience, to allow a jury to determine the value of this matter at trial, may create an exposure far beyond what the claimant is demanding at this time [$550,000.]" Champan recommended that the claims committee set settlement authority at the $400,000 policy limits.

¶17 Pelish provided the claims committee with a pre-trial evaluation report, dated September 2, 1994, stating that he believed the chances of Melby prevailing at trial were less than 50%. Pelish opined that if David Maxon's testimony that he called Melby a second time in one day describing his son's symptoms were believed, Melby would be found liable based on his own testimony, as Melby admitted that "if that description were given him, he should have told the father to bring the child into the hospital and the child could have been rehydrated and saved." Pelish stated that because loss of society and companionship damages were no longer capped by statute, "Five hundred thousand dollars is not out of the range, which could certainly be higher by much more." For unexplained reasons, Flatter never received a copy of this report.

¶18 On September 9, 1994, Pelish sent a letter to Melby stating:

> In my opinion, given the testimony of Mr. Maxon and now Nurse Lindberg, [who testified that she received the second message and gave it to Melby,] along with your inability to remember anything about the second phone call, it is probably an absolute that a jury will find that you were negligent in not advising Mr. Maxon to bring the child in to be seen.

Pelish stated further that the only remaining issues were contributory negligence and damages.

¶19 On September 22, 1994, Champan wrote in his progress notes, "Given that the insured testified that the child could have been saved at that time [if he had been brought in right after the second phone call], causation is also a loser …. The only question is damages and contributory negligence which is nil."

¶20 On October 18, 1994, the Physicians' claims committee discussed the Maxon case. Although new evidence was still developing, the committee discussed the case only once. With the exception of chairperson Dr. William Listwan's notes and Champan's progress notes, the claims committee did not preserve records of its meeting to allow a meaningful review of Physicians' claim valuation procedure. Listwan's notes reveal the gravity of Physicians' situation:

> Defense - weak
> Defendant - may have hung himself?
> Claimants - excellent witnesses
> Nurse at Hospital - wild card deposition Sept. 7-8
> Records - "pattern of changing records, losing records, and not releasing records." [T]hat does not bode well for us.

Based on the discussion of the above issues, the committee authorized Pelish to concede liability if it would keep inflammatory evidence from the jury.

¶21 Physicians' claims committee had difficulty valuing the case because it had limited experience with loss of society and companionship awards in wrongful death cases. The Wisconsin Supreme Court had recently declared that loss of society and companionship claims where medical malpractice led to wrongful death, if filed after January 1, 1991, were not limited by the damage cap

in WIS. STAT. § 655.017. ***Jelinek v. St. Paul Fire & Cas. Ins. Co.***, 182 Wis. 2d 1, 5, 512 N.W.2d 764 (1994). Accordingly, Physicians' claims committee gave great weight to the opinion of its claims representative, Brian Whealen, who had substantial experience valuing juvenile fatality cases in Nebraska. Whealen testified that Nebraska's cap on wrongful death damages was so high that it did not affect loss of society and companionship claims.[4] Whealen valued the Maxon case at $250,000. He reported that he had not seen a verdict or settlement for loss of society and companionship even close to $250,000. However, he could not name any of the comparable cases that led him to that value.

¶22 The committee rejected Pelish's and Champan's recommendations as to case valuation and authorized $250,000 to settle the case. On October 19, 1994, Physicians made a $200,000 settlement offer. The Maxons rejected that offer. Plaintiff's counsel, Gerald Bloch, acknowledged that the offer was increased to $250,000, but that offer was also rejected.

¶23 Sometime between September 18 and October 21, 1994, the Maxons' settlement demand increased to $650,000. Both Flatter and his manager at the Fund, Gerald Peura, testified that they were not informed of this final offer.

¶24 Flatter conducted a review of jury verdicts in other states for wrongful death cases and concluded that the case was worth $400,000 to $600,000. He testified that he suspected that the Maxons would have settled for $400,000 to $500,000. Although the parties dispute the adjustments Flatter made to the compared jury verdicts, Physicians had the opportunity to discredit his

[4] Whealen testified that in the 1980s, the cap for all wrongful death damages including medical expenses, lost future income and loss of society and companionship was $750,000 to 800,000 and in the early 1990s it was $1,250,000.

conclusions on cross-examination. Flatter explained his process and provided copies of his information sources to the jury. The jury also saw written evidence of another Fund claims adjuster, Harold Ungar, who evaluated the case and determined that it was worth $500,000 to $600,000, assuming no contributory negligence. Ungar's evaluation was based in part on the $550,000 plaintiff demand, as was Flatter's.

¶25 One month before trial, Flatter wrote to Champan noting that both Flatter and Champan "agree[d] that there are problems with our defense and that the case had a potential value that exceeds [Physicians'] policy limit." The Fund "strongly believe[d] that this is a case that should be settled." Champan acknowledged this communication and noted in his January 13, 1995, progress notes that "of course [settlement] can't happen because the Claims Committee extended only $250K in auth[ority]."

¶26 Penelope O'Hara presented on behalf of Physicians a summary of settlement or verdict results of all loss of society and companionship claims in wrongful death cases in the five years preceding the Maxon trial. Although the committee had discussed two of the twenty-two cases that O'Hara included in her analysis, these two were decided before damages were uncapped. The balance of the material in her presentation was gathered after the claims committee meeting. O'Hara omitted a $500,000 case that involved the death of an infant. Further, she admitted that the Maxon case had a higher verdict potential than any of the other cases she cited because of the circumstances, including the doctor's "memory lapses," evidence that he tampered with the medical records, and the damage cap release.

¶27 Based upon the above evidence, we are satisfied that the jury had sufficient evidence from which to find that a reasonable insurer would not have valued the claim at $250,000, and instead would have set the value at an amount substantially exceeding policy limits.

b. Physicians' Bona Fide Belief of the Claim Value

¶28 Because the jury found that Physicians' failure to offer policy limits demonstrated bad faith, Physicians argues that the jury necessarily found that Physicians "did not have an honest or bona fide belief that the probable jury verdict in Maxon would be less than $400,000" or, in other words, within policy limits. Physicians tacitly contends, however, that the evidence demonstrated its bona fide belief that the verdict would not exceed its policy limits.

¶29 Although presented as a separate issue, Physicians' bona fide belief argument essentially recasts its sufficiency of the evidence argument. Physicians fails to provide authority that a bona fide belief is a separate defense or issue. *See* WIS. STAT. RULE 809.19(1)(e). As discussed above, credible evidence supports the jury's finding that Physicians unreasonably disregarded opinions of the claim's potential value, a value likely to substantially exceed policy limits.

c. Arbitrary Verdict

¶30 Physicians next argues that the jury implicitly determined that the Maxons' claim could have been settled for $615,000. Physicians arrives at this number by subtracting the bad faith award, $425,000, from the Maxon verdict, $1,040,000, of which the jury was aware. Therefore, Physicians explains, the jury must have concluded that the Fund would have offered $215,000 to settle the case ($615,000 minus the $400,000 policy limit). Physicians contends that no evidence

supports that conclusion nor the implicit finding that, more likely than not, the Maxons would have settled for that amount.

¶31 First, Physicians complains, "The jury could only speculate as to whether the Fund would have offered significantly more than $100,000 to settle [the] Maxon [case], or whether the Maxons would have accepted any amount less than $650,000." It argues that the Fund did not set aside any money until late October 1994 and never increased the reserve beyond $100,000. Physicians contends that the Fund, as a plaintiff in a negligence action, failed to meet its burden of production because the Fund's representatives could only speculate as to how much the Fund would have reserved for the Maxon claim.

¶32 Second, Physicians argues that the jury arbitrarily set the settlement amount at $615,000, and the verdict should be reversed for that reason. It contends that all parties agree the amount is arbitrary and therefore the award cannot stand. The award is significant because it equals the Fund's statutory offer to settle the case. Physicians insists that had the award been figured to be "one cent more than $615,000," the Fund would not be entitled to any pre-judgment interest under WIS. STAT. § 807.01(4). Physicians asks the court to change the number to $650,000, which was the Maxon settlement position prior to trial and which implicitly reduces the jury award from $425,000 to $390,000.

¶33 The jury heard evidence indicating that Physicians failed to timely communicate to the Fund the $550,000 offer and failed to communicate the $650,000 offer entirely. The Fund, via both Peura and Flatter, testified, and Physicians concedes, that the Fund set aside $100,000 for the claim, but had authority to settle claims at amounts exceeding the reserve. Flatter, Pelish and Champan all agreed the case should be settled. The Maxons also wanted to settle.

The jury also heard testimony that Physicians had opportunities to settle the case for months prior to trial at $550,000. In addition, the record establishes that the Maxons would have certainly settled for $650,000 up until trial. No evidence indicates that the jury was aware of the statutory settlement offer or that the jury manipulated the verdict to ensure that the Fund would have received pre-judgment interest. We conclude that the jury reasonably determined, based on all the evidence, that the case could have been settled for $615,000.

III. Expert Testimony

¶34 Physicians complains that the Fund offered no expert testimony to evaluate whether Physicians breached its duty to the Fund and, therefore, verdict question number one's answer must be reversed. It asserts that expert testimony is required to explain how a reasonable insurer would value a claim like the Maxons' because the claim valuation process is not within the jury's ordinary experience. Physicians contends that an expert was necessary to establish whether it had a duty to offer policy limits or whether a reasonable insurer would have concluded that the claim probably, not just possibly, would have substantially exceeded Physicians' policy limits.

¶35 Physicians challenges the credibility of the Maxons' counsel's valuation of the case, contending that no bad faith case has premised an insurer's liability on plaintiffs' counsel's valuation. It also maintains that a plaintiff's counsel's testimony does not qualify as expert evidence. It submits that no testimony shows that Physicians acted unreasonably when it valued the case at less than policy limits. Physicians concedes that its claims committee concluded in October 1994 that a jury would likely find Melby negligent. However, it contends that most of the claims representatives had little experience with loss of society

and companionship cases where no cap on damages limited recovery. We reject Physicians' argument.

¶36 We conclude that expert testimony is not required. *See* WIS. STAT. § 907.02. The supreme court has declined to impose a bright-line rule requiring expert testimony in bad faith insurance cases. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 374, 541 N.W.2d 753 (1995):

> Cases presenting particularly complex facts and circumstances outside the common knowledge and ordinary experience of an average juror will ordinarily require an insured to introduce expert testimony to establish a prima facie case for bad faith. Under the facts and circumstances of other cases, however, the question of whether an insurer has breached its duty as a reasonable insurer to evaluate its insured's claim fairly and neutrally will remain well within the realm of the ordinary experience of an average juror and therefore will not require expert testimony. As this court has previously stated, the requirement of expert testimony is an extraordinary one, and is to be applied by the trial court only when unusually complex or esoteric issues are before the jury. (Citation omitted.)

¶37 We are unpersuaded that the case presented particularly complex facts outside an ordinary juror's comprehension. As the extensive facts related above illustrate, Physicians was aware of evidence indicating a verdict was probably going to be substantially greater than policy limits. We agree with the trial court when it stated: "[To rule] that expert testimony is necessary in order for this bad-faith case to proceed would seem to suggest that the original jury couldn't have reached their verdict without expert testimony." No party argues that the original jury required expert testimony.

¶38 In any event, several attorneys and claims adjusters arguably provided expert testimony. Pelish had practiced law for twenty years with

significant medical malpractice experience, defending Physicians in nine medical malpractice cases in one year. Champan was an experienced, competent claims adjuster. Peura had evaluated "thousands" of medical malpractice cases, and Flatter had evaluated "hundreds" or "thousands" of medical malpractice cases. Ungar worked for thirty years in the insurance industry and was a specialist in medical malpractice claims.

¶39 Finally, the jury was presented with a jury instruction that established what the parties agree is the legal standard for this case. Just as a jury may assess damages for loss of society and companionship, it was within the general ken of an ordinary jury to determine whether Physicians reasonably considered and rejected the evidence indicating a likely verdict substantially in excess of policy limits. We conclude that the trial court did not err when it declined to require expert evidence on this issue.

IV. Evidence Admissibility

¶40 Next, Physicians claims that the court erred when it allowed evidence of the Maxon verdict into the bad faith trial. It contends that the evidence was irrelevant and unfairly prejudicial. It asks this court to grant a new trial based on this alleged error even if the judgment is otherwise upheld.

¶41 Physicians claims that the Maxon malpractice verdict is not relevant to determine liability or the case's value during the time before the Maxons' trial. It asserts that liability cannot be determined by considering information not available at the time the insurance company made its now questioned decision, citing ***Rhiel v. Wisconsin County Mut. Ins. Co.***, 212 Wis. 2d 46, 56, 568 N.W.2d 4 (Ct. App. 1997). Physicians further argues that the Maxon verdict amount was irrelevant because the jury could have been asked to determine only the amount at

which the Maxon case would have settled before trial. Physicians also maintains that the court could have then independently determined damages by subtracting the jury's answer from the Maxon verdict.

¶42 Physicians also argues that the Maxon verdict was prejudicial because the jury, upon hearing opinions that the $1,040,000 verdict was not subject to appeal,[5] "likely concluded" that this amount was the claim's reasonable pre-trial valuation. Physicians cites the court's statement, "Essentially, this jury was asked to review the determination made by another jury," as precisely the reason why the verdict should not have been introduced as evidence. Physicians submits that the jury in this case was not supposed to evaluate whether the other jury reasonably valued the claim. It claims that the Maxon verdict distracted the jury from the real question: whether a reasonable insurer could have concluded that a verdict in excess of $400,000 was not probable, even if it was possible.

¶43 The Fund responds that the Maxon verdict is the reason the two parties are in the current lawsuit and this reason alone justifies its admission into evidence. Further, it argues that the verdict strongly tends to demonstrate that Physicians' valuation was low. The Fund queries, "Is it irrelevant to a product liability action that the product failed in exactly the way the manufacturer's own engineers warned it would fail?" It further claims that the jury instructions protected Physicians from unfair prejudice by explaining that "[t]he fact that a jury later awarded damages substantially in excess of the policy limits does not by itself mean that the insurer breached any of its duties to the Fund. Its conduct

[5] Pelish admitted on cross-examination that he advised Physicians to promptly pay the Maxon verdict because there were no likely meritorious appealable issues. In evidence was Bloch's letter to Pelish stating, "As you are well aware, there are no appealable issues in this case." Further, Champan's February 9, 1995, progress notes disclose, "No appealable issues."

should not be judged on the basis of hindsight, or what came later." We agree that the prior verdict was relevant and that the jury instruction protected Physicians from any unfair prejudice.

¶44 A trial court has broad discretion to determine whether to admit or exclude evidence and what instructions should be given to the jury. ***Ansani v. Cascade Mtn., Inc.***, 223 Wis. 2d 39, 45, 588 N.W.2d 321 (Ct. App. 1998). We will uphold a discretionary decision if the trial court examined the relevant facts, applied the proper standard of law and reached a reasonable conclusion. ***Id.*** at 45-46. We review de novo whether the court applied the proper standard of law. ***Id.*** at 46.

¶45 The cases Physicians cites do not preclude introducing the verdict. ***Rhiel*** does not state that the evidence of a verdict is irrelevant to a bad faith claim; it states that the evidence is "not conclusive" as to whether the claim was fairly debatable at the time the insurance company reviewed it. *See* ***id.*** at 56. Additionally, ***Mills v. Regent Ins. Co.***, 152 Wis. 2d 566, 576-77, 449 N.W.2d 294 (Ct. App. 1989), also does not hold, as Physicians contends, that verdict evidence is irrelevant. The evidence in ***Mills*** was not a verdict from a previous trial.[6] ***Id.*** at 577. The evidence Mills sought to introduce had to do with collateral issues and

[6] Mills sought to introduce evidence that after it denied his claim, Regent Insurance Company refused to pay the mortgage holder of the destroyed property until it could determine whether the policy's mortgage clause excluded liability. ***Mills v. Regent Ins. Co.***, 152 Wis. 2d 566, 576, 449 N.W.2d 294 (Ct. App. 1989). Mills also sought to introduce evidence that Regent's failure to pay the mortgagee harmed him. ***Id.*** at 576-77. Finally, he challenged the exclusion of evidence showing that Regent continued to deny his claim even after he had been acquitted of criminal charges for purposefully destroying the covered property. ***Id.*** at 577. The court concluded that whether Regent reasonably denied paying the mortgagee or whether this denial harmed Mills was irrelevant to determining whether Regent reasonably denied paying his claim. ***Id.*** Further, whether Mills had purposefully destroyed the covered property, though not criminally punishable, was still fairly debatable. ***Id.***

was irrelevant because it did not tend to prove or disprove whether the claim was reasonably denied. ***Id.***

¶46 By contrast, the Maxon verdict is relevant because it shows the damage to the Fund. Moreover, the jury instructions cautioned that the verdict was only a factor and did not by itself mean that Physicians breached its duty. Thus, the trial court reasonably determined that the Maxon verdict was relevant and that its prejudicial value did not outweigh its probative value.

¶47 Finally, although Physicians originally proposed that the jury determine the value at which the parties would have likely settled, it has not demonstrated with record cites that it preserved an objection to the final verdict form that omitted this question. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980) (inadequate arguments including those omitting record cites and authorities will not be considered). If Physicians wanted the jury to answer specific questions, it should have raised that issue so the trial court could have addressed the objection. *See* WIS. STAT. § 805.13(3); ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (failure to object at instruction conference waives any error in proposed instructions or verdict). The trial court properly exercised its discretion to admit the Maxon verdict evidence.

V. Attorney Fees and Costs

¶48 Whether attorney fees and costs should be awarded as damages is a question of law that we review de novo. ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 568, 547 N.W.2d 592 (1996).

a. Fees and Costs for a Bad Faith Claim

¶49 Physicians argues that under the "American rule," the Fund is not entitled to attorney fees and costs. It contends that ***Baker v. Northwestern Nat'l Cas. Co.***, 26 Wis. 2d 306, 132 N.W.2d 493 (1965), controls because it concluded that fees and costs incurred for non-contractual excess verdict damages are not recoverable. Physicians asserts that neither ***DeChant*** nor ***Majorowicz v. Allied Mut. Ins. Co.***, 212 Wis. 2d 513, 569 N.W.2d 472 (Ct. App. 1997), which awarded fees and costs only for breach of contract damages, considered ***Baker***, and therefore do not overrule ***Baker***.

¶50 The Fund argues that under ***DeChant***, attorney fees are recoverable in first-party bad faith cases and that under ***Majorowicz***, attorney fees are recoverable in third-party bad faith cases. It submits that unless attorney fees are awarded, the plaintiff would not be fully compensated for the actual harm flowing from an insurer's bad faith.

¶51 An insurance company that acts in bad faith is liable to the insured "in tort for any damages which are the proximate result of that conduct." ***DeChant***, 200 Wis. 2d at 571. The Fund is correct that attorney fees are recoverable in first-party and third-party bad faith cases. *See* ***Majorowicz***, 212 Wis. 2d at 536; ***DeChant***, 200 Wis. 2d at 577.

¶52 In ***DeChant***, the plaintiff sued his insurer for denying a disability benefits claim after he had already received benefits for five years. ***Id.*** at 564-65. The jury found that the insurance company had denied the claim in bad faith. ***Id.*** Upon review, the supreme court concluded that DeChant was entitled to attorney fees. ***Id.*** at 571. The court stated that a special fiduciary duty arises between an insurance company and an insured because of the great disparity in bargaining

power. ***Id.*** at 570. Breach of that duty is a tort unrelated to the contract damages. ***Id.*** at 569. "When such a breach occurs, the insurer is liable for any damages which are the proximate result of that breach." ***Id.*** at 570. The court concluded that the insurance company's bad faith denial of benefits exposed DeChant to additional uncompensable harms unless DeChant could recover attorney fees. ***Id.*** at 577.

¶53 ***Majorowicz*** concerned a third-party bad faith claim. ***Id***. at 521. In ***Majorowicz***, Allied Mutual Insurance Company represented its insured, Majorowicz, in a personal injury lawsuit. ***Id.*** The jury found Majorowicz responsible for $121,213.10 in excess of the policy limits. ***Id.*** Majorowicz sued Allied for bad faith, alleging that Allied failed to properly investigate, evaluate, negotiate, and communicate with him. ***Id.*** The jury found that Allied had resolved the claim in bad faith. ***Id.*** at 522. On a motion for relief under WIS. STAT. § 806.07, Majorowicz requested and the trial court awarded attorney fees in light of ***DeChant***, which had just been released. ***Id.*** at 534-35. Upon review, we affirmed the attorney fees award. ***Id.*** at 536.

¶54 ***Baker*** concluded that in a third-party bad faith claim, a successful plaintiff was properly awarded attorney fees for defending the underlying lawsuit but not those incurred in bringing the bad faith claim. ***Id.*** at 318-20. ***DeChant*** modified ***Baker***'s impact when it determined that a successful plaintiff would be entitled to attorney fees incurred in bringing a bad faith claim against the insurer.[7] ***Id.*** at 574-76. ***Majorowicz*** merely combined the concepts to award attorney fees

[7] Upon remand, we recognized in our published opinion that ***DeChant*** had overruled ***Baker*** in part. *See* ***DeChant v. Monarch Life Ins. Co.***, 204 Wis. 2d 137, 145, 554 N.W.2d 225 (Ct. App. 1996).

billed to defend the underlying lawsuit as well as to bring the bad faith claim. ***Id.*** at 536. ***Baker*** preceded both ***DeChant*** and ***Majorowicz***. If ***DeChant*** and ***Majorowicz*** were incorrectly decided or failed to consider ***Baker***, we are nevertheless without authority to overrule them. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶55 We conclude that under ***DeChant*** and ***Majorowicz***, the Fund is entitled to recover attorney fees and costs incurred in the prosecution of its bad faith claim. Further, the basis for recovering attorney fees is the fiduciary relationship, whether created by contract or statute. Thus, the distinction between contractual or statutory causes of action is immaterial. Had Physicians evaluated and resolved the claim in good faith, the Fund would not have needed to hire legal counsel to represent it in this bad faith action.

b. Waiver of Attorney Fees and Costs Award

¶56 Next, Physicians argues that the Fund was improperly awarded fees and costs as part of its compensatory damage claim because this request was not presented to the jury. Physicians claims that the parties did not stipulate that the court should decide attorney fees. Further, no statute states that this issue should have been tried to the court instead of the jury. Physicians discredits the cases cited by the Fund as inapposite because the fees and costs in those cases were awarded pursuant to contract or statute and not based on tort liability, as here. Physicians cites ***Brandt v. Superior Court***, 693 P.2d 796, 800 (Cal. 1985): "Since the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise." Physicians contends that because neither circumstance applies, the Fund waived its rights to attorney fees and costs.

¶57 The Fund responds that it sought attorney fees in its pleading and that it requested that the court determine the fees when it tendered its jury instructions. Because Physicians did not object until after the jury returned its verdict, the Fund contends that Physicians waived its right to object. Citing ***Martin v. Richards***, 192 Wis. 2d 156, 192-93, 531 N.W.2d 70 (1995), the Fund claims a party who fails to object to the exclusion of an issue from the jury verdict waives the right to object after the verdict is returned. Finally, the Fund submits that, California authority notwithstanding, under Wisconsin law the amount and reasonableness of attorney fees are matters for the court, citing ***Tesch v. Tesch***, 63 Wis. 2d 320, 334-35, 217 N.W.2d 647 (1974).

¶58 We agree with the Fund. We have already concluded that the Fund was entitled to attorney fees. We agree that under ***Tesch***, the trial court has discretion to determine the amount and reasonableness of attorney fees. ***Id.*** at 335. Once the jury found liability and damages, the court properly exercised its discretion to determine the appropriate attorney fees.

c. The Fees and Costs Motion

¶59 Physicians argues that the court erroneously awarded the Fund $13,000 in fees incurred by the Fund to prepare and argue its motion seeking fees and costs. Citing ***Meas v. Young***, 142 Wis. 2d 95, 106-07, 417 N.W.2d 55 (Ct. App. 1987), it contends that even if fees and costs are otherwise recoverable, this motion seeking fees and costs was a separate proceeding and is not compensable. It argues that ***DeChant*** expressly adopted ***Meas***, which unequivocally bars recovery of attorney fees incurred in seeking recovery of attorney fees. ***DeChant***, 200 Wis. 2d at 576; ***Meas***, 142 Wis. 2d at 106-07.

¶60 The Fund concedes that neither ***DeChant*** nor ***Majorowicz*** address this issue. However, it argues that these cases support awarding fees and costs for this motion because reimbursement will make the plaintiff whole, the purpose behind a bad faith claim. The Fund contends that ***Meas*** should not control because it pre-dated ***DeChant*** and ***Majorowicz*** by a decade and was not a bad faith case. We disagree.

¶61 Physicians correctly states the law. ***Meas*** disallowed the fees incurred in a proceeding "to actually recover those fees incurred in the 'prior' litigation." ***Id.*** at 106-07. ***DeChant*** explicitly recognized the ***Meas*** rule that allowed fees incurred in collateral litigation. ***DeChant***, 200 Wis. 2d at 576. ***DeChant*** implicitly adopted the ***Meas*** definition of collateral litigation that excluded a proceeding strictly to recover fees. ***Id.*** We, therefore, reverse the circuit court's decision to award attorney fees and costs incurred in the Fund's motion seeking attorney fees and costs.

VI. Pre-Judgment Interest on Attorney Fees

¶62 The Fund cross-appealed the circuit court's decision denying interest under WIS. STAT. § 807.01(4) on attorney fees. The Fund, early in the litigation, offered to settle the case for $425,000 plus costs. Physicians did not accept the offer. The jury awarded $425,000, and the court awarded $396,419.80 in attorney fees and expenses for litigating the bad faith claim. The court granted interest under § 807.01(4) on the $425,000, but denied it for the attorney fees and expenses.

¶63 The Fund argues that the attorney fees and litigation expenses were awarded as compensatory damages and should be considered part of the "amount recovered" as referenced in WIS. STAT. § 807.01(4), citing ***DeChant***, 200 Wis. 2d

at 577, and ***Majorowicz***, 212 Wis. 2d at 536. The Fund contends that "amount recovered" does not mean the same as "verdict" or "judgment." Further, it argues the "amount recovered" can include more than compensatory damages, citing ***Majorowicz***, 212 Wis. 2d at 538-39 (applying interest to punitive damages). The Fund asserts that the amount recovered does not depend on whether the jury or the court awards attorney fees or whether it is done at the end of a trial or on motions after verdict.

¶64 Physicians claims that under ***Nelson v. McLaughlin***, 211 Wis. 2d 487, 565 N.W.2d 123 (1997), the only award subject to interest under WIS. STAT. § 807.01(4) is that handed down by the trier of fact. In this case, the jury was the trier of fact and did not award attorney fees. Thus, Physicians argues, the Fund is not entitled to interest on the attorney fees. We agree.

¶65 Application of WIS. STAT. § 807.01(4) is a question of law that we review de novo. ***Nelson***, 211 Wis. 2d at 495. Section 807.01(4) provides:

> If there is an offer of settlement … which is not accepted and the [offering] party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the *amount recovered* from the date of the offer of settlement until the amount is paid. (Emphasis added.)

Nelson explained that the "amount recovered" means the portion of the verdict for which a party is responsible, not the entire verdict. ***Id.*** at 501. However, ***Nelson*** involved two defendants. Here, we only have one. ***Nelson*** does not address interest on attorney fees, but it did conclude that double costs added after verdict were not subject to WIS. STAT. § 807.01(4) interest. ***Id.*** at 499.

¶66 The ***Majorowicz*** court awarded attorney fees, although it implicitly excluded the attorney fees from the principal on which pre-judgment interest was calculated. ***Id.*** at 536, 538-39. ***Majorowicz*** awarded pre-judgment interest on the jury award of actual damages, double costs that Majorowicz was required to pay to the plaintiff in the underlying lawsuit, and punitive damages, making no mention of the inclusion of attorney fees in this calculation. ***Id.*** at 538-39.

¶67 In ***DeChant***, the jury was asked to calculate attorney fees and it awarded "100 percent." ***Id.*** at 566. The motion after verdict merely defined what "100 percent" meant. Here, the jury was asked "What sum of money will reasonably and fairly compensate the Fund for the loss it sustained as a result of [Physicians'] decision not to offer policy limits?" The jury answered $425,000.

¶68 Just as double costs in ***Nelson*** were added on after the jury issued its verdict, so too were attorney fees added in this case. *See* ***id.*** at 499. Just as double costs were not subject to pre-judgment interest in ***Nelson***, [8] neither does interest accrue on attorney fees added after the verdict. *See* ***id.*** We conclude that the trial court properly denied interest on the attorney fees and costs.

[8] Although it may appear that the court awarded interest on double costs in ***Majorowicz v. Allied Mut. Ins. Co.***, 212 Wis. 2d 513, 569 N.W.2d 472 (Ct. App. 1997), it only did so on the double costs that the plaintiff in the bad faith case was required to pay to settle the underlying lawsuit. ***Id.*** at 538.

By the Court.—Judgment affirmed in part; reversed in part. No costs awarded.

Not recommended for publication in the official reports.