

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 00-1191

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**FIDELITY AND GUARANTY INSURANCE
UNDERWRITERS, INC.,**

PLAINTIFF-RESPONDENT,

v.

PARKLAND VENTURE, L.L.C.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Parkland Venture, L.L.C. (Parkland) appeals from a judgment dismissing its claims against Fidelity and Guaranty Insurance Underwriters, Inc. (Fidelity) for property liability coverage and bad faith in

denying coverage. On appeal, it claims that the circuit court erroneously exercised its discretion in admitting a videotape into evidence and that the evidence does not support the jury's finding that there was no bad faith. Even assuming the circuit court erred in admitting the videotape, it was harmless error. The jury's verdict is supported by sufficient evidence. We affirm the judgment.

¶2 On May 2, 1997, Parkland Venture purchased commercial property in Muskego, Wisconsin, known as the Parkland Mall. On that same date, Fidelity's insurance policy commenced and was valid through May 2, 1998. On March 12, 1998, Parkland submitted a Proof of Loss to Fidelity seeking reimbursement for claimed loss and damage to the mall in the amount of \$3,300,000, as well as lost rental income of \$300,000. Parkland contended that the loss was occasioned by microbial contamination which caused "sick building syndrome," making the building untenable.

¶3 After investigation, Fidelity denied Parkland's claim on the ground that the loss did not occur during the period of coverage and the loss was occasioned by conditions specifically excluded by the insurance policy. When Parkland continued to assert coverage, Fidelity commenced this action for a declaratory judgment that the policy afforded no coverage to Parkland. Parkland counterclaimed, asserting that Fidelity exercised bad faith in conducting its claim investigation.

¶4 Parkland first argues that the circuit court erred when it admitted a videotape proffered by Fidelity just days before trial. We review a circuit court's decision to admit evidence under the erroneous exercise of discretion standard. *State v. Edmunds*, 229 Wis. 2d 67, 74, 598 N.W.2d 290 (Ct. App. 1999), *review denied*, 228 Wis. 2d 175, 602 N.W.2d 760 (Wis. Aug. 24, 1999) (No.

98-2171-CR). We will uphold a discretionary decision if the trial court relied on facts of record, applied the correct legal standard and arrived at a reasonable conclusion. *Id.*

¶5 A pretrial order required Fidelity to provide a witness list and list of documents by August 15, 1999, and Parkland to do so by September 15, 1999. Discovery was to be completed thirty days prior to the trial date of December 7, 1999. The initial witness lists were provided in a timely fashion. On October 16, 1999, Parkland filed an amended witness list and list of documents. Fidelity filed a supplemental list of documents on December 1, 1999, three business days prior to the trial, which listed a “[v]ideotape by Randy Rozman taken in 6/97.”

¶6 The proffered videotape became the subject of a motion in limine by Parkland to exclude the videotape based upon its late proffering and concomitant surprise. The circuit court initially ruled that the videotape could not be admitted due to noncompliance with the pretrial order.¹ However, Fidelity requested that the court view the videotape and the court thereafter determined that the videotape could be shown. The circuit court found it relevant and of assistance to the jury.

¹ In its initial ruling excluding the videotape, the circuit court determined that the videotape would be excluded, stating that admission of the videotape was unfairly prejudicial to Parkland because “it gives him no opportunity at all to prepare for and do any contrary videotaped deposition that he may feel is appropriate.” The court further stated that Parkland had no time to consult with its experts regarding the impact of the videotape. Additionally, the court noted that pictorial evidence was already available to the jury in the form of photographs that could adequately depict the condition of the mall at the time in question. Finally, the court stated, “[T]he Court closed off all discovery 30 days prior to trial. The Court imposes these deadlines to make certain that the parties are ready to go to trial and so that they don’t come in the day before trial such as we’re dealing with here dealing with the exact same issues.” At that time, the court determined that the videotape should be barred based upon noncompliance with the pretrial order, concluding that it was highly prejudicial.

¶7 Parkland argues that Fidelity’s failure to comply with discovery deadlines unfairly prejudiced it and the circuit court failed to find excusable neglect in permitting an end-run around the deadlines. We assume, without deciding, that the circuit court erroneously exercised its discretion in admitting the videotape proffered at the eleventh hour. However, the error was harmless. WIS. STAT. § 805.18 (1999-2000).² The evidence presented in the form of the videotape was cumulative to other evidence presented. Fidelity provided testimony from four witnesses detailing the “soggy” and ever-deteriorating conditions of the mall for the past ten years. Additionally, there were numerous photographs depicting the same conditions in the mall. Indeed, in its initial ruling on the videotape, the court alluded to the ability of Fidelity to demonstrate the condition of the mall through the use of the photographs.

¶8 Moreover, there was really no dispute that the Parkland Mall was a “mess,” which was essentially the purpose of the videotape.³ Any issue of the dilapidated condition of the building was conceded in Parkland’s closing argument when its attorney stated that “[w]e concede that the Parkland Mall was a mess when Parkland Venture bought it. Everybody recognized that the roof leaked.”

² WISCONSIN STAT. § 805.18(2) (1999-2000) provides:

No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

³ The real controversy in the case was whether the loss was occasioned by a policy exclusion. This was essentially a battle of experts.

The videotape was not used as a pivotal point in closing arguments at trial. In fact, the videotape was not even mentioned in the closing argument of either party. The real issue in the case was whether the loss was occasioned by fungus or bacteria. The videotape did nothing to aid the jury in its search for the cause of the “sick building syndrome” which led to Parkland’s loss.

¶9 Parkland next contends that the circuit court erred when it denied Parkland’s motion to reverse the jury’s verdict that Fidelity did not exercise bad faith in its investigation of the claim. Parkland contends that Fidelity limited the scope of its investigation so that only exclusions to the policy would be investigated and discovered. A reviewing court will not upset a verdict if any credible evidence supports it. *Johnson v. Neuville*, 226 Wis. 2d 365, 378, 595 N.W.2d 100 (Ct. App. 1999). The credibility of the witnesses and the weight afforded their testimony is left to the province of the jury. *Id.*

¶10 When Fidelity became aware that Parkland’s loss was occasioned by “sick building syndrome,” it hired Robert Safe, an industrial hygienist from the firm of Boelter and Yates, to determine the source of the contamination. Safe testified at trial that at no time were limitations placed upon the scope of the investigation. Additionally, upon cross-examination, he testified that he had never seen the insurance policy at issue which listed the exclusions.

¶11 Donald Mueller, the claims representative responsible for investigating Parkland’s claim, testified that he did not place any limitations on Boelter and Yates in conducting their investigation. He stated, “I basically wanted them to go out there and find whatever they would find out there. I had no idea. Obviously, I needed an expert like this, so I needed them to look at everything.” For example, Mueller testified that ice damage, claimed by Parkland, was

investigated by Boelter and Yates. A loss caused by ice damage would have been covered under Parkland's policy.

¶12 *Johnson* provides that “[w]e look for credible evidence to sustain a jury’s verdict In addition, even if more than one reasonable inference may be drawn from the evidence, we must accept the inference the jury draws.” *Id.* (citations omitted).

¶13 The inference drawn by the jury from the evidence presented was that Fidelity conducted a neutral and unbiased investigation of the claim. It is a reasonable inference based on testimony from Safe and Mueller. We must defer to the jury’s credibility determinations and weight assigned to the testimony. *Id.* Credible evidence supports the jury verdict that Fidelity did not exercise bad faith in its investigation of Parkland’s claim.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

