COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

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, STATS.

NOTICE

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

No. 95-3019

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

KATHLEEN LANGRECK,

Plaintiff-Appellant,

v.

SHEBOYGAN FALLS MUTUAL INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Wood County: EDWARD F. ZAPPEN, JR., Judge. *Reversed and cause remanded with directions*.

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

DEININGER, J. Kathleen Langreck appeals from a judgment dismissing her bad faith claim against Sheboygan Falls Mutual Insurance Company (Sheboygan Falls). The jury had answered "yes" to the first verdict question, "Did Sheboygan Falls Mutual Insurance Company exercise bad faith in denying policy benefits to Kathleen Langreck?" and awarded Kathleen $65,520 in damages. On motions after the verdict, the trial court ordered the

jury's answer to the first question be changed to "no" and entered a judgment dismissing the action. Because we find there was credible evidence before the jury to support its verdict, we reverse. We also hold that Kathleen is not entitled to prejudgment interest on the verdict, a matter not addressed by the trial court.

FACTS

The home of Kathleen Langreck and her children, and many of its contents, were extensively damaged by a fire on May 22, 1991. The home was jointly owned by Kathleen and her husband, David Langreck, from whom she was separated. A divorce action was pending. Sheboygan Falls insured the Langreck home and contents.

Local fire and police investigators, as well as an investigator retained by Sheboygan Falls, determined within days after the fire that it had been set intentionally. There was also evidence leading investigators to believe that David Langreck had been involved in the setting of the fire. Kathleen had herself told a police investigator that she suspected David's involvement.

Sheboygan Falls' adjuster reported to the insurer his "opinion that the contents loss will exceed the policy limit [$38,450]." Sheboygan Falls procured two estimates on the cost of repairs to the dwelling, one for $51,175 and the other for $47,787. The adjuster also made arrangements for the insurer to advance funds to Kathleen for living expenses, for rent on an apartment to be paid by the company, and for the purchase of some necessities such as mattresses. Payments for these items totalled $3,311.95. Sheboygan Falls had authorized ServiceMaster, a firm which does fire clean up and restoration, to service the home, and the company ultimately paid $10,500 to ServiceMaster.

In June 1991, the adjuster provided Kathleen with a proof of loss form and instructed her to have it signed by both her and David, notarized and submitted. No deadline for submission of the proof of loss was specified when the form was provided to Kathleen. In September 1991, Kathleen submitted proofs of loss to Sheboygan Falls through her divorce attorney. Sheboygan Falls

rejected the proofs of loss, it stated, because they bore only Kathleen's signature, were not timely submitted, contained "inflated" values, and because of unspecified "other matters which may appear." At about this same time, Kathleen and David, through their respective divorce attorneys, had agreed upon a family court order giving Kathleen "primary responsibility" to negotiate with Sheboygan Falls regarding the loss, and directing that any proceeds would be deposited with her counsel pending further order of the family court.

David's signature was ultimately procured on the proofs of loss and they were resubmitted in November 1991. The proofs requested the policy limits for both the structure ($76,900) and contents ($38,450), together with about $7,800 for "loss of use" expenses. Sheboygan Falls then requested its outside counsel, Mr. Gross, to conduct "examinations under oath" as permitted by the policy. The examinations were conducted on January 2, 1992. In December, Kathleen and David had reconciled, and David's divorce attorney, Mr. Day, now represented both of them regarding the insurance claim.

Following the examinations, the Langrecks procured and submitted a damage estimate for the structure which established the cost to repair at $86,397. In a letter dated January 6, 1992, to Sheboygan Falls, Attorney Gross suggested that it propose an initial settlement offer as follows:

> Although I have not looked at these numbers carefully, it does seem that the cost to repair on the structure exceeds 50 percent of the value of the structure and that these damages might under other circumstances entitle the claimants to a policy limits recovery on the structure. I would consider a settlement proposal in the amount of the total of the coverage on the structure and the contents without adding any amount for loss of use and minus the ServiceMaster bill, any amount paid, including the rent paid for Kathleen Langreck, and minus 20 to 25 thousand dollars representing the sum that the carrier would accept to waive the opportunity to litigate the arson and insurance fraud issues before a Wood County jury.

Thereafter, settlement negotiations began between attorneys Gross and Day, with Sheboygan Falls proposing a total payment of $50,000 in new money over and above the $13,800 which had been previously paid out for temporary living expenses and cleaning services. Day's initial proposal requested $131,226.54. While there were some further discussions between Day and Gross thereafter, additional settlement discussions were not productive.

A meeting was held on July 10, 1992, at which Day and Gross, as well as Kathleen and David, were present. By this time, the one year statute of limitations under § 631.83(1), STATS., had passed, although neither side was apparently aware of that fact at that time. The July 10, 1992 meeting produced no further settlement initiatives, and on August 24, 1992, Gross wrote to Day informing him that "My client has directed me to preserve all defenses available under Wisconsin Statutes and pursuant to the Contract of Insurance and specifically directed me to confirm with you the denial of the Langreck's [sic] claim."

From as early as June 1991, Sheboygan Falls was aware of Kathleen's potential claim for a portion of the policy proceeds as an "innocent spouse," notwithstanding David's suspected involvement with the fire. Attorney Gross wrote to his client on June 20, 1991, that Kathleen "appears to be an innocent spouse," and that he was "inclined to first look at how the insurance contract and past case law handles the claim of an innocent spouse." This research was never pursued, however. Gross and Sheboygan Falls' claims manager discussed the matter and "traded the observation" that Kathleen may "ha[ve] something coming" under the policy even if David was involved in the fire. On this issue, the jury was instructed as follows:

> This policy exclusion, as interpreted by this court, does not bar coverage to the innocent spouse of a person who intentionally destroys their jointly owned property.
>
> In the case of an innocent spouse and a wrongdoer who both intend to continue their marriage, as a matter of law, the innocent co-insured is entitled to only one-half of what the recovery would have been absent the intentional act.

During the fourteen months of investigation and settlement negotiations, Sheboygan Falls had specifically instructed Attorney Gross not to accuse David directly of arson, although Gross indicated that he had verbally passed on his client's view that there was evidence of David's involvement in the fire. No criminal charges were ever brought against David.

In 1993, the Langrecks terminated the services of Attorney Day and attempted to deal with Sheboygan Falls directly. They subsequently commenced this action alleging breach of contract and bad faith in the denial of the claim. The trial court granted Sheboygan Falls' motion for summary judgment dismissing the contract claim based on the statute of limitations. The action continued solely on the bad faith claim. David subsequently obtained separate counsel, and shortly before trial, elected to dismiss his claim against the insurer. Thus, only Kathleen's bad faith claim was tried to the jury.

At trial, Kathleen testified on her own behalf and presented testimony from Attorney Day, two contractors who had made repair estimates and David Langreck. She also produced an expert on the issue of proper claims handling procedures, who testified that Kathleen's claim "wasn't handled properly" and that, in his opinion, Sheboygan Falls had no factual basis to deny coverage to Kathleen. Sheboygan Falls presented testimony from the adjuster who handled the claim, Attorney Gross, its claims manager, another contractor who had given a repair estimate, a police investigator, a fire investigator, and a second expert on claims handling procedure. The jury was also informed of the stipulation by the parties that Sheboygan Falls "had a reasonable basis to deny any coverage to David Langreck because of evidence that existed concerning his possible involvement in the fire."

Sheboygan Falls moved for dismissal at the close of Kathleen's case and for a directed verdict at the close of all evidence. The court took both motions under advisement. The jury found Sheboygan Falls had exercised bad faith and awarded damages of $65,520. Sheboygan Falls filed a number of motions after the verdict, and Kathleen moved for prejudgment interest on the verdict. The trial court ordered the jury's answer on the bad faith question changed and entered a judgment of dismissal. Declaring Kathleen's motion for interest "moot," the trial court declined to rule on the motion.

THE JURY'S VERDICT

A. Standard of Review

Sheboygan Falls brought post-verdict motions directed toward Question No. 1 of the verdict under § 805.14 (3), (4) and (5)(d), STATS., and requested a "directed verdict or dismissal" claiming "there is no credible evidence to sustain" a jury finding of bad faith. The trial court found that there was not "anything in the evidence that was presented to the jury that would support a jury finding that this insurance company acted in bad faith," and ordered "that the answer to Question No. 1 of the Special Verdict shall be and hereby is changed from `Yes' to `No' ...."

We have recently commented at length upon the various § 805.14, STATS., motions and their applicable standards of review. ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 541 N.W.2d 203 (Ct. App. 1995). Here, as in ***Foseid***, the trial court entered an order to change the verdict "on the ground of insufficiency of the evidence." Section 805.14(5)(c) STATS. "[W]hen the court changes an answer in the jury's special verdict, or otherwise overturns a jury finding, we defer to the verdict by applying the traditional any-credible-evidence standard ...." ***Id.*** at 787, 541 N.W.2d at 209.

Thus, "if there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned." ***Id***. at 782, 541 N.W.2d at 207. And, "[w]hen 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.'" ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 389-90, 541 N.W.2d 753, 761-62 (1995) (quoted source omitted).

B. Elements of Bad Faith

"To establish a claim for bad faith, the insured `must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 377,

541 N.W.2d 753, 757 (1995) (quoting ***Anderson v. Continental Ins. Co.***, 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978)).[1]

C. The Evidence

Sheboygan Falls argues that there was "no credible evidence established at trial which could support a finding that Sheboygan Falls lacked a reasonable basis, either in fact or in law for the denial of the claim, and that it knew or recklessly disregarded the lack of any such reasonable basis in fact or in law for the denial of the claim."

First, Sheboygan Falls posits that Kathleen's expert's testimony was not credible. The defense extensively cross-examined Kathleen's expert, and any diminution of his credibility was thus before the jury. The credibility of a witness, and the weight to be given his or her testimony, are absolutely the province of the jury. *See* ***Meurer v. ITT General Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). We may not conclude that evidence is incredible unless it is "`in conflict with the uniform course of nature or with fully established or conceded facts.'" ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.***, 96 Wis.2d 314, 338, 291 N.W.2d 825, 837 (1980) (quoted source omitted). Moreover, even a complete absence of expert testimony is not necessarily fatal to a plaintiff's bad faith claim. ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 382, 541 N.W.2d 753, 758-59 (1995).

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[1] The trial court instructed the jury regarding the two elements of bad faith. The jury was also instructed on an insurer's fiduciary duty to an insured:

> The insurer has a fiduciary duty to act towards the insured and to exercise the same standard of care that the insurance company would exercise were it exercising reasonable diligence with respect to its own business. A breach of this fiduciary duty is evidence of bad faith.

Another jury instruction called attention to WIS. ADM. CODE § INS 6.11(3), a copy of which was introduced into evidence. The jury was instructed that if it found Sheboygan Falls "committed any of those acts [listed in WIS. ADM. CODE § INS 6.11(3)] without just cause, you may, but are not required to consider such acts as evidence of bad faith." No issue is raised on this appeal regarding any of the instructions given.

Further, Sheboygan Falls' own expert provided testimony that was favorable to Kathleen's case. The defense expert acknowledged that the fact Kathleen's proof of loss was late was not a proper reason for denying her claim, nor was her "settlement posture." He even acknowledged that the suspicions of David's involvement in the fire would not have justified a denial with respect to Kathleen, agreeing that the innocent spouse issue "popped out at you" on these facts.

Sheboygan Falls next urges us to concur with the trial court's finding "as a matter of law" that Sheboygan Falls had no affirmative obligation to advise Kathleen that she could assert an innocent spouse claim. We need not determine whether Sheboygan Falls had such a duty "as a matter of law" in order to decide this case. The relevant duty, as the jury was instructed, is the insurer's "duty of ordinary care and reasonable diligence in investigating and evaluating claims." We hold that the evidence before the jury, drawing all inferences therefrom as favorably to Kathleen as her case in chief permits, ***Weiss***, 197 Wis.2d at 390, 541 N.W.2d at 762, is sufficient to sustain the jury's verdict that this duty was breached.[2]

As to whether Sheboygan Falls had a reasonable basis to deny Kathleen's claim, the jury heard testimony that there was no evidence that Kathleen was involved in any way in the setting of the fire. The jury was aware that Attorney Gross had advised Sheboygan Falls that Kathleen appeared to be an innocent spouse and that further research into that issue was merited. The jury further heard testimony that Sheboygan Falls' claims manager had concurred with Gross that Kathleen may have "something coming" notwithstanding David's possible involvement in the fire. The jury also heard testimony that Sheboygan Falls' adjuster had advised the insurer early on that the contents loss likely exceeded the policy limit of $38,450, and that Attorney Gross had told the insurer that despite its repair estimates of approximately $50,000, Kathleen might be entitled to "a policy limits recovery on the structure."

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[2] Sheboygan Falls also argues that whether Kathleen qualified as an "innocent spouse" was "fairly debatable," and it was thus entitled to debate it, citing ***Anderson v. Continental Insurance Co.***, 85 Wis.2d 675, 691, 271 N.W.2d 368, 276, (1978). The difficulty with this argument is that the record does not reflect that Sheboygan Falls, although aware of the innocent spouse issue within a month of the fire loss, ever considered any uncertainty surrounding Kathleen's status under the innocent spouse doctrine as a reason for denying her claim.

From this evidence, it is not unreasonable for the jury to have concurred with Kathleen's expert's opinion that Sheboygan Falls had no factual basis to deny coverage to her.

There was also sufficient evidence from which the jury could conclude that Sheboygan Falls was at least reckless in disregarding the absence of a basis for denying coverage to Kathleen. In failing to follow Attorney Gross's advice that the innocent spouse issue be researched, and in refusing to accept a proof of loss from Kathleen alone, the jury could have reasonably concluded that Sheboygan Falls recklessly disregarded Kathleen's entitlement to coverage. The jury might well have inferred that in pursuing only a joint settlement with both Kathleen and David, Sheboygan Falls disregarded Kathleen's valid claim in an attempt to avoid litigating and proving David's involvement in the fire, which would have been necessary in order to deny coverage to him. Such an inference would not be unreasonable in light of the credible evidence presented to the jury.

Accordingly, we defer to the jury's verdict and direct that its answer be reinstated.

PREJUDGMENT INTEREST

Kathleen seeks prejudgment interest at the rate of twelve percent per annum pursuant to § 628.46(1), STATS.,[3] on the jury's damage award of

[3] Section 628.46(1), STATS., provides:

> **628.46 Timely payment of claims.** (1) Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any payment shall not be deemed overdue

$65,520, from October 23, 1991, a date thirty days after she initially filed her proof of loss, through the date of the verdict. She claims that prejudgment interest under § 628.46(1) is mandated whenever a jury has found bad faith, citing ***Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mutual Insurance Co.***, 146 Wis.2d 470, 484-85, 431 N.W.2d 689, 695 (Ct. App. 1988).

Sheboygan Falls argues that § 628.46(1), STATS., applies only to damages awarded on insurance contract claims and not to damages awarded to compensate a plaintiff on a tort claim for bad faith. We agree. In ***Poling v. Wisconsin Physicians Service***, 120 Wis.2d 603, 357 N.W.2d 293 (Ct. App. 1984), we upheld the award of twelve percent prejudgment interest under § 628.46(1) on damages for breach of an insurance contract but reversed the trial court's award of prejudgment interest on bad faith and punitive damage awards. ***Id***. at 611-612, 357 N.W.2d at 298-99.

Kathleen's reliance on ***Upthegrove*** is misplaced. The plaintiff there brought an action on an insurance policy for its full limits, for bad faith, and for punitive damages. ***Upthegrove***, 146 Wis.2d at 474, 431 N.W.2d at 691. Prior to trial, the parties stipulated that unless the insurer could prove that plaintiff intentionally set the fire, it was liable for "the full claim on the policy." ***Id***. The jury found plaintiff had not set the fire and that the insurer had acted in bad faith. It also awarded $375,000 in punitive damages. We reversed the trial court's denial of twelve percent interest on the policy claim damages because the jury's finding of bad faith precluded the insurer from avoiding interest under § 628.46(1), STATS., by claiming that it had "reasonable proof to establish that the insurer is not responsible for the payment." ***Id***. at 484-485, 431 N.W.2d

(..continued)

> when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer. For the purpose of calculating the extent to which any claim is overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery. All overdue payments shall bear simple interest at the rate of 12% per year.

at 695. There were no damages awarded in ***Upthegrove*** for bad faith. There was only the policy claim damages, stipulated to be the policy limit, and punitive damages awarded by the jury, upon which prejudgment interest was not allowed.

Kathleen suggests that it is "non-sensical" to require an insurer to pay prejudgment interest if it litigates a good faith dispute over the amount of damage, but to allow an insurer to avoid prejudgment interest when it is assessed damages for exercising bad faith in denying a claim. In analyzing former § 636.10, STATS., a predecessor to § 628.46(1), STATS., the Wisconsin Supreme Court noted:

> As stated above, the tort of bad faith is not for the breach of a contract. It is a separate tort. Sec. 636.10 is merely an additional provision of the insurance contract incorporated into it by operation of law. It is unrelated to the tort of bad faith.

Anderson v. Continental Ins. Co., 85 Wis.2d 675, 696, 271 N.W.2d 368, 378-79 (1978).

The legislature has seen fit to incorporate a provision for the payment of interest on late paid claims into insurance contracts. Whether it is "non-sensical" not to also impose interest on damages awarded for the tort of bad faith denial of an insurance claim is for the legislature and not this court to ponder. *See* ***Madison Teachers, Inc. v. Madison Metro. Sch. District***, 197 Wis.2d 731, 755, 541 N.W.2d 786, 796 (Ct. App. 1995).

The judgment of the trial court is reversed and the cause is remanded with instructions to reinstate the jury's answer of "yes" to Question No. 1 of the verdict; to enter judgment in favor of plaintiff for the amount awarded by the jury; and to deny plaintiff's motion for prejudgment interest.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.