IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN R. TALMAGE,

OPINION AND ORDER

Plaintiff,

03-C-0658-C

v.

CHARLES B. HARRIS
DOAR, DRILL & SKOW, S.C.
and CNA INSURANCE COMPANY,

Defendants.

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This civil case for legal malpractice is before the court on two motions filed by defendants Charles B. Harris, Doar, Drill & Skow, S.C. and CNA Insurance Company: one to change the answers to Questions 1 and 3 in the special verdict form and a second one for dismissal, for a directed verdict or for judgment notwithstanding the verdict (now known as judgment as a matter of law). Defendants preserved their right to seek judgment as a matter of law by moving for it at the close of plaintiff's case and again at the close of all the evidence.

This case arose out of a fire that damaged plaintiff's business premises. Plaintiff's insurer agreed that coverage existed. The adjuster it sent out was unable to find anyone who

could make a knowledgeable estimate of the extent of damage or the cost of repairs or anyone who would be willing to take on the job of re-building the facility. Therefore, he and plaintiff agreed that plaintiff would undertake the repairs himself, on a time-and-materials basis. The work went along reasonably well for some time. Plaintiff submitted invoices to the insurer, who paid them, essentially without complaint, until they exceeded $317,000. At that point, the insurer stopped because it questioned the necessity of the work, its relation to the fire damage and the reliability of the bills that plaintiff was submitting. Plaintiff believed the company was being unreasonable in delaying payment and sought out defendant Harris to represent him in a bad faith suit. Defendant brought suit on plaintiff's behalf against the insurer; the case never went to trial because the parties reached an agreement to submit the dispute to an appraisal proceeding that resulted in settlement. The insurer paid plaintiff an additional $114,000; plaintiff agreed to dismiss the suit. Although plaintiff was under the impression that the settlement would not bar him from pursuing a separate bad faith claim against the insurer, defendant Harris refused to bring such a case.

In order for plaintiff to prevail on his legal malpractice claim, he had to convince the jury first, that he had a viable claim of bad faith against the insurer and second, that defendant Harris acted improperly in not pursuing it. In his effort to show that the insurer had acted in bad faith, plaintiff called Russell Bohach, a lawyer, to testify at trial on standards of reasonableness in handling insurance claims. Prior to trial, defendants moved

to bar Bohach from testifying on the ground that he was not qualified as an expert. I denied the motion. I conclude now that this ruling was erroneous. Although Bohach has extensive knowledge about the law of bad faith claims, he lacks the knowledge of the insurance industry and its customs and practices that would enable him to hold himself out as an expert on those matters. It does not follow, however, that the verdict must be set aside because of this error.

Plaintiff argues that no expert testimony was necessary in this trial, making Bohach's qualifications irrelevant. He relies on the state supreme court's decision in Weiss v. United Fire & Casualty Co., 197 Wis. 2d 365, 541 N.W.2d 753 (1995), in which the court held that expert testimony is not required in every bad faith insurance case, only in cases in which the allegations of bad fall do not fall "within the common knowledge or ordinary experience of an average juror." Id. at 382, 541 N.W.2d at 758. To prove bad faith, a trier of fact has to "measure[] the insurer's conduct against what a reasonable insurer would have done under the particular facts and circumstances to conduct a fair and neutral evaluation of the claim." Id. at 378, 541 N.W.2d at 757. In Weiss, the insurance company's investigator failed to report the fact that he had removed electrical wires from the scene and the company failed to obtain full financial information about plaintiff and did not consider the fire chief's conclusion that the fire was not caused by arson, the condition of the electrical wiring of the house or that the house was underinsured. In these circumstances, the court held, a lay juror

could find bad faith on the part of the company without expert testimony. Id. at 387, 541 N.W.2d at 760.

Plaintiff argues that this case is "remarkably similar" to Weiss. Plt.'s Br., dkt. #86, at 3. He argues that it would not be an unusually complex or esoteric matter in either case for the jury to determine whether the insurer had delayed unreasonably in paying plaintiff for his covered fire losses.

Plaintiff is overstating the similarities between the two cases. Nevertheless, I agree that the acts and omissions in dispute in this case are not so esoteric that a lay jury could not decide them. The crux of the bad faith case was the reasonableness of the insurer's belief that plaintiff's invoices were not reliable, accompanied by its decision to delay additional payments until it could resolve its concerns about the invoices. It was not beyond the jury's ability to determine whether, under all the circumstances, it was unreasonable for the insurer not to have paid plaintiff the full amount he sought in reimbursement for his work in rebuilding his business premises. It could determine whether the company acted unreasonably in stopping payment of the time and materials invoices when questions arose about their accuracy and validity. Jurors are called on regularly to determine whether one party has adequate reasons to withhold payments due another. In this case, the jury heard all the reasons why the insurer withheld payment and why it wanted to gain a more precise understanding of the costs of re-building before making any additional payments to plaintiff,

including the insurer's concerns about plaintiff's lack of credibility. It did not require an expert to help it evaluate the reasonableness of the insurer's decision to withhold the payments.

Although expert testimony might be necessary to prove a bad faith claim involving complex or technical aspects of the insurance industry, Weiss, 197 Wis. 2d at 382, 541 N.W.2d at 758, this case does not implicate that kind of specialized knowledge. Defendants' position was that the steps the insurer had taken were reasonable ones under the circumstances. The jury disagreed, after hearing all of the evidence. That decision did not rest on matters beyond the ordinary experience of the average juror but rather but on matters that laypersons were well positioned to evaluate.

Defendants raise another challenge to the verdict. They contend that the damages award should be reduced from $68,322.67 to $32,632.00 because plaintiff did not introduce enough evidence to establish any loss beyond the $32,632.00 he paid in legal fees to defendant Harris. Defendants concede that if the jury acted reasonably in finding that the insurer acted in bad faith, plaintiff is entitled to recover the amount of attorney fees he paid defendant to pursue a bad faith claim. However, they contend that there is no support in the record for the award of the remaining $35,690.67.

Plaintiff suggests that the award can be attributed to the loss plaintiff incurred by the forced sale of his business. The difficulty with this suggestion is that the evidence at trial

was insufficient to establish a causal link between the insurer's delay in payments and the decline in the value of the business. At trial, I ruled that plaintiff could not seek damages for interest costs because he had not shown what payments the insurer should have paid him on which dates. Without this information, the jury would have been unable to tie any specific interest charges to a delay in payment. The same flaw is present in plaintiff's claim for damages resulting from the alleged decline in the value of his business. The evidence does not show when the insurer's delay in payments amounted to bad faith, so that the jury could determine what relationship the bad faith delay had to the decline in value of plaintiff's business, as distinguished from a decline attributable to delays that were reasonable. Therefore, I will grant defendant's motion to change the answer to Question No. 3 to $32,632.00.

ORDER

IT IS ORDERED that the motions of defendants Charles B. Harris, Doar, Drill & Skow, S.C. and CNA Insurance Company to dismiss, for directed verdict or for judgment as a matter of law are DENIED; their motion to change the answers on the verdict form is DENIED with respect to the answer to Question No. 1 and GRANTED with respect to the answer to Question No. 3, which is changed from $68,322.67 to $32,632.00.

The clerk of court is directed to enter judgment in conformance with this order and

close the case.

Entered this 17th day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge