

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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No. 00-2369

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ALAN J. SAPKO,

PLAINTIFF-APPELLANT,

V.

**COMMERCIAL UNION MIDWEST
INSURANCE COMPANY,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County:
RICHARD J. KREUL, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Alan J. Sapko has appealed from a judgment entered in favor of his homeowner's insurer, Commercial Union Midwest Insurance Company, following a jury trial. We reverse the judgment and remand the matter for a new trial.

¶2 Sapko owns a residence in Racine, located on property which abuts Lake Michigan. A retaining wall separates his lawn from the lake. During the evening of March 8, 1998, and the early morning of March 9, 1998, a severe storm struck the Racine area, with winds reported up to fifty-seven miles per hour. On the morning after the storm, Sapko discovered that his retaining wall had suffered severe damage, including a large break near the southeast corner of the wall, and a smaller break along the 203-foot stretch of wall which ran parallel to the shoreline.

¶3 Sapko reported the damage to his insurance agent on March 9, 1998. Commercial subsequently denied coverage and Sapko commenced this action, alleging claims for breach of contract and the tort of bad faith.

¶4 At trial, the jury returned a special verdict providing as follows:

Question No. 1:

Do the exclusions in the Commercial Union Midwest Insurance Company's policy apply and result in no coverage for the plaintiff Sapko's damage claims related to the retaining wall loss?

ANSWER: Yes

....

Question No. 3:

Did defendant Commercial Union Midwest Insurance Company on September 28, 1998 have reasonable proof to establish that it was not responsible for payment for the Sapko retaining wall loss?

ANSWER: Yes

Question No. 4:

Did the defendant Commercial Union Midwest Insurance Company exercise bad faith in denying plaintiff Sapko's claims for damages related to his retaining wall loss?

ANSWER: Yes

¶5 In motions after verdict, Sapko moved to change the jury's answers to questions one and three. Commercial moved to change the answer to question four. Alternatively, both parties moved for a new trial on the ground that the verdict answers were inconsistent. Ultimately, the trial court changed the jury's answer to question four from "yes" to "no," and entered judgment in favor of Commercial.

¶6 On appeal, Sapko renews his argument that the verdict is inconsistent, entitling him to a new trial. He also contends that the trial court erred in changing the jury's answer to question four. We agree with both of these contentions.¹

¶7 A verdict is inconsistent when the jury's answers are logically repugnant to one another. *Imark Indus., Inc. v. Arthur Young & Co.*, 148 Wis. 2d 605, 623, 436 N.W.2d 311 (1989). In the event of an inconsistent verdict which is not properly subject to a waiver of claim by the objecting party, and which is not rectified by resubmission under direction to the jury, a new trial is required. *Id.*

¶8 To establish a claim for bad faith against an insurer, an insured must show the absence of a reasonable basis for the denial of benefits under his or her insurance policy, and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Anderson v. Cont'l Ins. Co.*, 85 Wis.

¹ Sapko also argues that he is entitled to a new trial because question one was misleading and confusing to the jury. In addition, he contends that he is entitled to a new trial in the interests of justice. Because we are granting a new trial based upon inconsistencies in the verdict, we need not address these issues.

2d 675, 691, 271 N.W.2d 368 (1978). In connection with question four of the special verdict, the jury was instructed that:

To prove bad faith against Commercial Union Midwest Insurance Company, Alan Sapko must establish that there was no reasonable basis for the insurance company's denying Alan Sapko's claim for benefits under his policy and that Commercial Union Midwest Insurance Company, in denying the claim, either knew or recklessly failed to ascertain that the claim should have been paid.

....

Bad faith exists if, upon an examination of the facts found by you, you are able to conclude that Commercial Union Midwest Insurance Company had no reasonable basis for denying Alan Sapko's claim.

¶9 The jury's finding that Commercial acted in bad faith in denying Sapko's claim is clearly inconsistent with its answer to question one, in which it found that the exclusions in the policy applied and resulted in no coverage for Sapko's damage claim. In accordance with the instructions given to the jury, in order to find that bad faith existed, the jurors had to conclude that Commercial had no reasonable basis to deny Sapko's claim, and that the claim should have been paid. By determining that the claim should have been paid, the jury clearly found that the loss was covered under the policy and was not excluded. However, in answering question one, the jury found that exclusions applied and precluded coverage for Sapko's claim. These answers were logically repugnant. Similarly, the jury's answer to question four was inconsistent with its answer to question three, which found that on September 28, 1998, Commercial had reasonable proof to establish that it was not responsible for payment for the retaining wall loss.

¶10 The inconsistency in the verdict was recognized not only by Sapko, but also by Commercial, which moved the trial court to grant a new trial based on

an inconsistent verdict in the event its motion to change the jury's answer to question four was denied. In addition, the trial court acknowledged that, absent its order directing a verdict on the bad faith issue and changing the jury's answer to question four, the verdict would be inconsistent.

¶11 The inconsistency in the verdict could be eliminated only if the trial court was correct in changing the answer to question four from "yes" to "no." A motion to change a jury's answer challenges the sufficiency of the evidence to sustain the answers given. WIS. STAT. § 805.14(5)(c) (1999-2000).² In reviewing an order changing a jury's answer, we begin with considerable respect for the trial court's better ability to assess the evidence. *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). However, we may overturn a trial court's decision to change one or more answers in a verdict if the record reveals that the trial court was clearly wrong. *Id.* at 671-72.

¶12 In considering a motion to change the jury's answers, the trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. *Id.* at 671. If there is any credible evidence to support the jury's findings, a trial court is not justified in changing the jury's answers. *Id.* The trial court must defer to the jury's assessment of the credibility of witnesses and the weight to be given their testimony, and must accept the reasonable inferences drawn by the jury. *Id.* When 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 & Cas. Co.*, 197

² All references to the Wisconsin Statutes are to the 1999-2000 version.

Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995) (citation omitted). On appeal, we are guided by these same rules. *Richards*, 200 Wis. 2d at 671.

¶13 Because credible evidence supported the jury's finding that Commercial acted in bad faith in denying Sapko's claim, the trial court erred in denying the jury's answer to question four. As previously noted, to establish a claim for bad faith, the insured must show the absence of a reasonable basis for denying benefits and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Weiss*, 197 Wis. 2d at 377. The first prong of this test is objective; the second is subjective. *Id.* To satisfy the first prong, the insured must establish that under the facts and circumstances of the case, a reasonable insurer could not have denied or delayed payment of the claim. *Id.* at 378. In applying this test, the jury may determine whether the insurer properly investigated the claim and whether the results of the investigation were subjected to reasonable evaluation and review. *Id.* "In other words ... the trier of fact measures 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.*

¶14 Credible evidence supports findings that Commercial did not subject Sapko's claim to a reasonable investigation and evaluation, and that a reasonable insurer would not have denied his claim. At trial, Commercial contended that it was entitled to deny coverage based upon exclusions for water damage, earth movement, and the pressure of water. The water damage and earth movement exclusions were set forth in the Section I–Exclusions section of Commercial's policy, and provided:

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded

regardless of any other cause or event contributing concurrently or in any sequence to the loss.

....

b. Earth Movement, meaning ... earth sinking, rising, or shifting;

c. Water Damage, meaning:

(1) ... surface water, waves, ... whether or not driven by wind;

(2) Water below the surface of the ground, including water which exerts pressure on ... a foundation ... or other structure.

¶15 The portion of the policy captioned “Section I-Perils Insured Against” further provided that Commercial did not insure for losses to a retaining wall or bulkhead caused by “pressure or weight of water.”

¶16 Evidence at trial indicated that after Sapko discovered the damage to the wall on March 9, 1998, he contacted Tom Cecchini, a commercial contractor with experience in concrete construction, to investigate the damage. Based upon their examination, Sapko and Cecchini believed that the wall had been struck by a heavy object. Sapko also observed a black spot near the break in the wall and believed it might have been a lightning strike.

¶17 Sapko reported the damage to Commercial on March 9, 1998. Jim Barish was assigned by Commercial to evaluate the loss and coverage, and reported to Commercial that there was extensive damage to the retaining wall due to wind, a type of covered loss. Commercial elected to send John Henik, a structural engineer, to inspect the wall. Henik subsequently visited the site, but declined to walk down the stairs adjacent to the wall to view the actual location of the major break. On May 7, 1998, Henik prepared a written report for

Commercial, stating that “[b]ased on the initial site visit, we are unable to determine the cause of failure of the retaining wall. Further investigation is needed to ascertain the cause of failure.” However, he further stated:

We can speculate however that the cause of failure can be attributed to one or both of the following:

- a. The heavy rainfall followed by snow saturated the soil behind the retaining wall, creating an “undrained” condition. The wall in this scenario would have failed by overstress of the wall stem at its base....
- b. The soil on which the retaining wall bears may have failed. Failure of the soil could have occurred through “shear failure” due to the large horizontal thrust created in the saturated soil condition or by settlement of the soil and erosion due to the action of the water thus “undermining” the foundation and producing wall rotation.

¶18 Henik also pointed out that during his inspection, Sapko had raised the issue of whether the failure of the wall had resulted from a lightning strike or the impact of the wall by a large object. Without further discussion of the matter, Henik simply stated that he did not concur with these conclusions.

¶19 Commercial also engaged Raymond Franz of Engineering Testing Services, Inc., to provide a soil analysis of the site. Franz took two soil borings at the site on May 18, 1998, a little over two months after the damage had occurred. In his written report, Franz stated that “a precise cause of the failure cannot be determined” because many of the factors affecting the wall had changed or been obscured since the time of the storm. However, Franz further stated that he believed the “most probable cause” was the development of water pressure behind the wall, “which could have developed from conditions likely to have existed before and during the time of failure.” He then listed various conditions that

might have existed, such as broken drains, blocked or frozen weep holes, and prolonged surface infiltration.

¶20 The jury was entitled to conclude that Commercial could not reasonably have relied on the Henik or Franz reports to deny coverage. Testimony indicated that Henik's inspection was limited, and even Henik concluded that he was unable to determine the cause of the failure. While he proceeded to speculate that saturation of the soil or heavy rainfall was the cause, the report was not based upon information regarding the actual rainfall before or at the time of the storm, nor on information as to the actual condition of the soil at the time of the storm. Similarly, while Franz made calculations as to the amount of force that would be required to undermine the wall, those calculations were based upon assumptions about the saturation level of the soil which were not supported by the soil borings conducted by him. The data from the soil borings did not demonstrate soil and water pressures which were sufficient to cause the wall to fail, nor did his report include information showing actual moisture levels or other conditions, either at the time of his inspection or at the time the wall was damaged, sufficient to undermine the wall in accordance with his calculations. In addition, neither Franz nor Commercial was aware of any blocked or frozen drains or weep holes on Sapko's property at the time of the storm.

¶21 The jury was also entitled to consider the evidence that the weather data gathered by Kathleen Kowalski, the claims adjustor for Commercial, did not support the soil and water pressure theories of causation discussed by Henik and Franz. The weather data did not support the underlying assumptions of Franz and Henik regarding soil saturation. Moreover, the evidence indicated that Kowalski never conveyed the weather data information to Henik and Franz, both of whom had acknowledged in their reports that they could not definitely determine the

cause of damage to the wall based on the limited information they had. Under these circumstances, the jury was entitled to find that no reasonable insurer would have relied on their reports and speculations to conclude that the wall failed because of water pressure or earth movement.

¶22 The jury could also reasonably find that Commercial gave inadequate consideration to Sapko's claim that the damage resulted from a blow from a large object or from lightning. Henik's report acknowledged that these theories were raised by Sapko, but discounted them with no explanation. Moreover, at trial, Sapko presented testimony from both Cecchini and Dr. William Painter, a geotechnical engineer, indicating that they concluded that the wall was damaged when it was struck by a large object, like a rock or a piece of concrete. Testimony at trial indicated that large rocks and armor stone were located on the lake side of the retaining wall, as was a concrete slab that had been used as a boat pier. Testimony further indicated that during the March 1998 storm, large, multi-ton rocks were thrown upon the land and roadway at a lakeshore park in Racine.

¶23 Painter testified that he inspected the site, viewed numerous photographs depicting the scene at the time of the loss, examined information concerning the meteorological conditions at and prior to the time of the storm, and reviewed news articles about the storm. He testified that blowing wind creates waves, and that large rocks and boulders can be picked up and moved through the air. He concluded that in this case, concrete or large pieces of rock were picked up and thrown into the wall, causing it to fracture. He testified that it was the force of the rock that caused the damage to the wall, not the force of the water. Based upon information regarding the weather conditions at the time of the storm and the actual precipitation for the two to three months before the storm, Painter also concluded that, contrary to the assumptions of Henik and Franz, the soil was not

saturated and that the fracture in the wall was not the result of water or soil pressure.

¶24 Based upon the testimony of Painter and Cecchini, the jury could find that coverage existed because the wall was damaged when a rock or other large, hard object was thrown against it like a projectile during the storm. Based upon Commercial's failure to investigate Sapko's theories of how the damage occurred, the inadequacies in the reports of Henik and Franz, and Commercial's failure to convey to its experts weather data which would have obviated the assumptions on which their water pressure and earth movement theories depended, the jury could reasonably find that Commercial acted in bad faith in denying Sapko's claim. *Cf. id.* at 390-92 (jury could find that insurer acted in bad faith in denying a claim when it ignored information indicating that the cause of the loss fell within the scope of its policy's coverage, and relied upon an inadequate investigation by its investigator).

¶25 Commercial contends that the trial court acted properly in changing the jury's answer to question four because, even accepting the testimony of Painter and Cecchini as true, coverage was barred by the water damage exclusion. Essentially, Commercial argues that under the theory propounded by Painter and Cecchini, the rock or other object that struck the retaining wall was first placed in motion by the action of the waves. Commercial contends that because the waves were thus a factor in causing the damage, coverage is excluded by the water damage exclusion.

¶26 Commercial made this argument to the jury, which was entitled to reject it. The language of the water damage exclusion reasonably could be understood by the jury as requiring damage from the waves themselves, or from

the water driven by the waves, before it could be applied to deny coverage. Painter testified that it was the force of the rock or concrete, not the force of the water or waves, which damaged the wall. Based upon this evidence, the jury could find that the damage to the wall was caused solely by the rock, concrete, or other hard object. In addition, the jury could have found that the rock or concrete slab was put into motion by the action of the wind, which stirred up both the waves and material in the water, ultimately propelling rock or concrete through the air and into the wall. Because the jury could reasonably find that the damage to the wall was caused by wind and rock or concrete rather than by water, the jury could also reasonably find that Commercial should have paid Sapko's claim.

¶27 Because the jury reasonably could find that Commercial should have paid Sapko's claim, that it relied upon an inadequate investigation by its own experts, and that it failed to adequately consider and investigate information indicating that the damage to the wall fell within the scope of its policy's coverage, credible evidence supported its finding of bad faith. The trial court therefore erred in changing the answer to question four. Because the verdict as rendered by the jury is inconsistent, a new trial on both the breach of contract claim and the bad faith claim is required.

¶28 As a final matter, Sapko objects to the trial court's refusal to submit a punitive damages question to the jury. He contends that the evidence presented at trial permitted a finding that punitive damages were warranted, and that the issue of whether they should be awarded should have been submitted to the jury. He contends that on retrial, a punitive damages question should be included in the special verdict.

¶29 Whether a punitive damages question is warranted on retrial will depend upon the evidence submitted at the new trial. Because that evidence may be different than the evidence which was presented in the first trial, it would be premature to determine whether a punitive damages question is warranted. Sapko's request is therefore denied.

By the Court.—Judgment reversed and cause remanded.

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

