COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3427

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

DONA M. KONRADY AND MELVIN R. KONRADY,

PLAINTIFFS-RESPONDENTS,

V.

BREMER INSURANCE AGENCIES, INC., F/K/A FIRST AMERICAN INSURANCE AGENCIES, INC., A MINNESOTA CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions.*

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

¶1 CANE, C.J. Bremer Insurance Agencies, Inc., appeals from a judgment in favor of Dona and Melvin Konrady and from an order denying its post-trial motion. A jury determined that insurance agent Gregory Romanofsky,

Bremer's employee, negligently failed to procure adequate replacement cost coverage for the Konradys' veal barn, which was later destroyed in a fire. The trial court denied Bremer's motion to change the verdict's answers or, alternatively, to grant a new trial.

¶2 We conclude that there is insufficient proof to sustain the jury's verdict because the Konradys failed to provide expert testimony to assist the jury in determining whether Romanofsky was required to recalculate the barn's replacement cost annually. We conclude that the trial court erred when it denied Bremer's motion to change the verdict's answers. We reverse and remand with directions to enter judgment for Bremer.

STATEMENT OF FACTS

¶3 The Konradys owned a veal barn that was constructed in 1980. The Konradys purchased insurance coverage for the barn through insurance agent Fred Kressly until 1992, when Kressly retired. In 1994, they approached Romanofsky seeking insurance for their land, homestead, barns and other outbuildings.

¶4 Romanofsky met with the Konradys at their home and toured the veal barn and other areas of the farm. Melvin Konrady testified he told Romanofsky he wanted replacement cost coverage so that if the barn was destroyed, the insurance would cover the cost of rebuilding. Romanofsky testified that they discussed replacement cost coverage and that the Konradys had been carrying replacement cost coverage with a limit of $85,000.

¶5 To estimate the replacement cost for the barn, Romanofsky consulted the Boeckh Agricultural Building Cost Guide, which is issued annually. Using calculations listed in the guide, Romanofsky estimated the replacement cost

of the barn to be $97,873. One of the calculations in the guide involves a multiplier based on the location of the property. When Romanofsky used the location multiplier to arrive at a cost estimate of $97,873, the location multiplier was 1.24.[1]

¶6 Romanofsky testified he told Melvin Konrady that if the Konradys wanted to apply for coverage with a limit of $85,000 and self-insure the remainder, that was permissible because the Konradys would be insuring at least eighty percent of the estimated replacement cost. At trial, Melvin Konrady did not dispute this, and testified that he elected to apply for a policy with $85,000, given Romanofsky's statement that it was permissible.

¶7 The insurance application was sent to Commercial Union, the insurer that ultimately issued the policy. An underwriter for Commercial Union testified that when the Konradys' application arrived, an underwriter used the Boeckh Cost Guide and estimated the barn's replacement cost at $100,733. The application was approved, and a policy was issued insuring the veal barn for $85,000.

¶8 In 1995, 1996 and 1997, the Konradys renewed their policy. Each year, Commercial Union automatically increased the policy limit based on inflation. The policy at issue here, covering the period May 1, 1997, through May 1, 1998, had a limit of $93,784. Each year, Romanofsky met with the Konradys to discuss their coverage. It is undisputed that Romanofsky did not reinspect the barn or again analyze the barn's replacement cost using the Boeckh

[1] This fact is particularly relevant because the location multiplier increased in the years that followed to 1.8 in 1998, the year the Konradys' barn was destroyed in a fire.

Cost Guide. It is also undisputed that the Konradys did not specifically ask him to do so.

¶9 On April 12, 1998, fire destroyed the Konradys' veal barn. Commercial Union paid the Konradys the $93,784 policy limit. However, the Konradys obtained an estimate that it would cost over $210,000 to replace the barn. The Konradys met with Romanofsky, who recalculated the barn's replacement cost using the 1998 Boeckh Cost Guide, which listed the updated location multiplier as 1.80. Romanofsky estimated the replacement cost to be $148,388.

¶10 The Konradys filed this action against Bremer, arguing that Romanofsky had negligently provided inadequate replacement cost insurance. Specifically, the Konradys argued at trial that Romanofsky should have, on his own initiative, recalculated the replacement cost of the Konradys' veal barn each year using the updated location multiplier listed in the Boeckh Cost Guide. If Romanofsky had done so, they argued, he would have been alerted to the fact that the replacement cost of the barn had risen higher than would be covered by the standard inflation increases in their insurance policy. Then, Romanofsky could have contacted the Konradys to discuss increasing the policy limits.

¶11 At the close of the Konradys' case, Bremer moved for a directed verdict on grounds that the Konradys had failed to produce an expert to establish the standard of care. The trial court concluded that expert testimony was not required and denied the motion. The jury found that Romanofsky had performed negligently and awarded damages of $125,000.

¶12 In post-trial motions, Bremer moved to change the verdict's answers with respect to negligence, based on insufficiency of the evidence. *See* WIS.

STAT. § 805.14(5)(c).[2] Bremer argued that there was no evidence from which a jury could conclude that an insurance agent breaches a duty of care when the agent fails to recalculate a property's replacement cost when the insurance policy is renewed.[3] Bremer also argued that expert testimony was required to establish the standard of care.

¶13 Bremer sought, in the alternative, a new trial on four grounds: (1) improper examination by the trial court; (2) erroneous use of a standard jury instruction; (3) erroneous admission of opinion testimony; and (4) insufficiency of evidence to support the damages verdict. The trial court denied Bremer's post-trial motion, and this appeal followed.

¶14 Bremer presents the same arguments on appeal that were raised in its post-trial motion.[4] We conclude that the issue concerning expert testimony is dispositive. Therefore, we decline to address the other issues. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible ground). We reverse and remand with directions to enter judgment for Bremer.

LEGAL STANDARDS

[2] All statutory references are to the 1999-2000 version unless stated otherwise.

[3] None of the four insurance agents who testified indicated that it is his practice to recalculate a property's replacement cost using the Boeckh Cost Guide each time the policy is renewed. Bremer's expert, Eugene LaMere, and Romanofsky both testified that they know of no agent who does so.

[4] Bremer did not argue at the trial court, or on appeal, that Romanofsky had no duty as a matter of law to advise the Konradys regarding the adequacy of their policy limits for replacement coverage. *See* ***Lenz Sales & Serv., Inc. v. Wilson Mut. Ins. Co.***, 175 Wis. 2d 249, 257, 499 N.W.2d 229 (Ct. App. 1993) (absent special circumstances, agent had no duty to advise insured regarding the inadequacy of policy limits for contents replacement).

¶15 A motion to change the jury's answers challenges the sufficiency of the evidence to sustain the answers given. *See* WIS. STAT. § 805.14(5)(c).[5] The lack of expert testimony in cases which are so complex or technical that a jury would be speculating without the assistance of expert testimony constitutes an insufficiency of proof. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 381, 541 N.W.2d 753 (1995). Whether expert testimony is required in a given situation must be answered on a case-by-case basis. ***Robinson v. City of West Allis***, 2000 WI 126, ¶33, 239 Wis. 2d 595, 619 N.W.2d 692. This presents a question of law that we decide without deference to the trial court. ***Grace v. Grace***, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995).

DISCUSSION

¶16 Wisconsin law allows an insured whose claim is denied by the insurer to bring a tort action against the insurance agent for failing to procure the proper coverage. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 238, 568 N.W.2d 31 (Ct. App. 1997). The tort is based on an agent's duty to use reasonable skill and diligence to put into effect the insurance coverage requested by the policy holder. ***Id.*** The agent has fulfilled this duty if the agent procures a binding contract of insurance that conforms to the agreement between the agent and the insured. ***Id.***

¶17 Most of the cases against insurance agents for failure to procure the insurance requested by the insured are based on common law negligence.

[5] WISCONSIN STAT. § 805.14(5)(c) provides: "*Motion to change answer.* Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer."

Appleton Chinese Food Serv. v. Murken Ins., 185 Wis. 2d 791, 519 N.W.2d 674 (Ct. App. 1994). In such cases the insured must prove: (1) a duty on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. *See* ***Smith***, 212 Wis. 2d at 238.

¶18 Insurance agents are required to "use the degree of care, skill, and judgment which is usually exercised under the same or similar circumstances by insurance agents licensed to sell insurance in Wisconsin." *See* ***Appleton Chinese Food Serv.***, 185 Wis. 2d at 803 n.4 (citing WIS JI—CIVIL 1023.6).[6]

¶19 At trial, the Konradys argued that Romanofsky was negligent because he failed to estimate the replacement cost annually using the most recent Boeckh Cost Guide, or at least do a brief calculation using the updated location multiplier, even though the Konradys did not ask Romanofsky to perform this

[6] WISCONSIN JI—CIVIL 1023.6, Negligence of Insurance Agent, provides in relevant part:

> An insurance agent, such as (defendant), must use the degree of care, skill, and judgment which is usually exercised under the same or similar circumstances by insurance agents licensed to sell insurance in Wisconsin.
>
> While there is no duty to advise the policy holder of coverages available, the agent must use reasonable skill and diligence to put into effect the insurance coverage requested by his or her policy holder, act in good faith towards that policy holder, and inform him or her of the minimum statutory requirements. A failure on the agent's part to use that skill or diligence constitutes negligence.

recalculation or question the level of insurance on their barn. In closing argument, counsel for the Konradys stated:

> Now, how easy would it have been for Mr. Romanofsky on the annual policy review when it came through his office to look at that declaration page and run a multiplier with the Boeckh system? [Bremer's expert witness] said it would take a few seconds. And then if he sees that number and he has concerns about it, then he'll talk to [Melvin Konrady] or ask [Melvin Konrady if he has] any questions about this. That's not an overwhelming task to require of an insurance agent who, I submit, respectfully the Konradys have an absolute right to rely upon. …
>
> ….
>
> I submit, ladies and gentlemen, as representatives of this community, you have the right to expect and can find that there was not due diligence exercised by Mr. Romanofsky. He did not at least in using a multiplier in the Boeckh system to be sure that the amount of replacement cost of insurance was adequate for the Konradys. [sic] That would have taken a very, very short period of time. And, ladies and gentlemen, he had to meet with them anyway as he stated.
>
> ….
>
> What he should have done, we submit, is that on the annual renewals of his policies that he use not a full Boeckh analysis, but the multiplier which would take a few seconds. It is almost an administrative requirement. It is almost a maintenance sort of thing, a routine thing, just to check to be sure the numbers are correct knowing, again, that my clients want replacement cost coverage. I submit they probably could have some type of computer program to do that the way technology is.

¶20 Bremer argues that the Konradys' theory that Romanofsky was required to recalculate the property's replacement cost annually using the Boeckh

Cost Guide was not based on competent expert testimony.[7] As a result, Bremer contends the jury was allowed to speculate "about how they, as jurors, would like to see insurance agents conduct themselves."

¶21 In response, the Konradys argue that no expert testimony was necessary because the "type of quick calculation for renewal policies was a simple mathematical process" more akin to administrative, ministerial or routine activities that do not require expert testimony because they are easily understood by a jury. We disagree with the Konradys.

¶22 In ***Weiss***, our supreme court considered whether insureds in bad faith cases are required to introduce expert testimony to establish a prima facie case. *See* ***Weiss***, 197 Wis. 2d at 379-80. The court rejected a categorical requirement and concluded that when an insurer's alleged breach of its duty of good faith and fair dealing toward its insured involves facts and circumstances within the common knowledge or experience of an average juror, an insured need not introduce expert testimony to establish a bad faith claim. ***Id.*** at 382. Conversely, if the circuit court finds that an insurer's alleged breach of its good faith duty involves "unusually complex or esoteric" matters beyond the understanding of an average juror, the circuit court should require an insured to introduce expert testimony to establish a prima facie case for bad faith. *See* ***id.***

[7] Bremer also argues that there was no lay testimony supporting the plaintiff's theory. It notes that the four insurance agents who testified all indicated that they do not use the Boeckh cost guide to recalculate replacement costs each year. Because we conclude that the Konradys were required to introduce expert testimony concerning the standard of care, we do not address Bremer's argument that there is insufficient evidence, lay or otherwise, to support the jury's verdict.

¶23 Applying these principles, ***Weiss*** concluded that the facts and circumstances of the insurer's investigation of the claim and analysis of the investigation results were within the common knowledge and ordinary experience of an average juror. ***Id.*** ***Weiss*** noted, "The investigation at issue in this case did not involve complex or technical knowledge of the insurance industry or industry practices. Thus, the average juror might readily determine, without the benefit of expert testimony, whether [the insurer] had a reasonable basis for denying policy benefits." ***Id.*** at 382-83.

¶24 Consistent with ***Weiss***, we reject the proposition that expert testimony is required in all insurance agent negligence cases. Instead, whether expert testimony is required in insurance agent negligence cases should be answered on a case-by-case basis. *See* ***Robinson***, 2000 WI 126 at ¶33. It is appropriate to use the general standards articulated in ***Weiss*** to decide whether expert testimony was necessary in this case.

¶25 Applying the ***Weiss*** standards, we conclude that expert testimony was required. The issue at trial was whether Romanofsky failed to use the degree of care, skill and judgment usually exercised under similar circumstances by insurance agents because he failed to recalculate the barn's replacement cost each year using the updated Boeckh Cost Guide location multiplier. We disagree with the Konradys that whether and how Romanofsky should have performed this task is within the common knowledge and ordinary experience of an average juror.

¶26 At first blush, the facts suggest that expert testimony may not be required. Whether Romanofsky should have consulted a guide and done the math is not a difficult concept. However, what is difficult for the lay person to understand is whether requiring agents to recalculate a property's replacement cost

annually is consistent with the standard of care required of insurance agents. Notably, in this case, there was uncontroverted evidence that agents generally *do not* perform this recalculation. Only the Konradys' counsel, in closing argument, suggested that "[i]t is almost an administrative requirement" to recalculate replacement costs annually.[8]

¶27 Nothing in the record convinces us that jurors are familiar with the Boeckh Cost Guide or the how and when of its general use. Unlike the facts in ***Weiss***, the alleged negligence in this case involves technical knowledge of the insurance industry and industry practices. Accordingly, expert testimony was required to establish the standard of care. *See* ***Weiss***, 197 Wis. 2d at 382. Because the Konradys failed to provide the requisite expert testimony, there was insufficient proof concerning the standard of care. *See* ***id.*** at 381. Thus, the jury's verdict cannot be sustained. We conclude that the trial court erred when it denied Bremer's motion to change the verdict's answers. We reverse and remand with directions to enter judgment for Bremer.

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

Not recommended for publication in the official reports.

[8] Not only was this statement not supported by expert or lay testimony, it also contradicts the general principle that absent special circumstances, insurance agents have no duty as a matter of law to advise insureds of the adequacy of their policy limits for replacement coverage. *See* ***Lenz Sales & Serv.***, 175 Wis. 2d at 257.