COURT OF APPEALS DECISION DATED AND RELEASED

November 8, 1995

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. 94-1143

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

LOIS TABAR,

Plaintiff-Respondent,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, JAMES BINKOWSKI and ANDREW KASMER,

Defendants-Appellants,

DIANE MOSSBURG,

Defendant.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

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

PER CURIAM. American Family Mutual Insurance Company, Andrew Kasmer and James Binkowski appeal from a judgment in favor of Lois Tabar. Because the special verdict was properly formulated and there is

credible evidence to support the jury's verdict, we deny the appellants' request for a new trial and affirm.

This dispute has its genesis in Tabar's desire to procure less expensive health insurance after her Mid-America Insurance Company premium increased. Tabar's Mid-America premium was due on or before November 1, 1991, but the policy had a thirty-one day grace period. Tabar's Mid-America policy was set to expire on December 2.

Tabar's home and automobile insurance agent, Diane Mossburg, arranged for her to meet with Binkowski, another agent in her office, to discuss replacement health insurance. Before meeting with Tabar, Binkowski determined that American Family offered the most reasonable premium and so advised Mossburg. Binkowski, who was not an American Family agent, had contacted his stepfather, Kasmer, an American Family agent, to discuss American Family health insurance.

Upon hearing from Mossburg that American Family's policy would be less costly, Tabar called Binkowski to verify the amount of the premium and the type of insurance she would receive from American Family. Tabar testified that she described her Mid-America coverage to Binkowski and informed him that she was in the grace period and wanted her American Family coverage to begin when her grace period ended in order to save money and avoid a lapse in her coverage. Tabar had two telephone conversations with Binkowski to arrange a meeting to complete the American Family insurance application.

On December 2, 1991, Mossburg escorted Tabar to Binkowski's office. Mossburg told Binkowski that Tabar was in the last day of her grace period and that her insurance needs had to be met as soon as possible. Binkowski denied that either Tabar or Mossburg told him that Tabar was in the grace period of an existing policy.

Binkowski asked Tabar a series of questions as he filled out the American Family application. Tabar asked Binkowski when the policy would be effective. He responded that it would be effective that day, December 2, as

soon as she paid him. Binkowski pointed to the middle area of the application where the date "December 2, 1991" appeared in a box labeled "unbound effective date." Tabar gave Binkowski a check for the premium, which he forwarded with her application to Kasmer. Kasmer signed the application and forwarded it to American Family. The application was subsequently returned to Binkowski because some questions on the application were incomplete.

What Tabar and Binkowski discussed regarding American Family's thirty-day waiting period for covered sickness benefits[1] and the policy's effective date, and what Binkowski understood about Tabar's desire to avoid a lapse in coverage as she shifted from Mid-America to American Family were disputed at trial.

Two months after meeting with Binkowski, Tabar received a copy of the application in the mail and realized that Binkowski did not indicate that she planned to replace existing insurance. Tabar testified that she did not read the insurance application because she trusted Binkowski and believed he was accurately recording her answers to his questions at their December 2 meeting. Binkowski testified that he reviewed every question on the application with Tabar, although he was unable to explain why some of the questions had not been answered.

On December 3, 1991, Tabar began experiencing eye discomfort. Shortly thereafter, tests revealed that she had a brain aneurysm. Tabar underwent several surgeries and incurred medical expenses of approximately $130,000.

American Family declined to pay Tabar's medical bills because she incurred them during the policy's thirty-day waiting period for covered sickness benefits. Tabar sued American Family, Binkowski, Kasmer and Mossburg to recover her medical expenses, claiming that American Family

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[1] The policy provides:

> Coverage will be only for loss from accidental injury that takes place after the effective date or for sickness manifested more than thirty days after the effective date.

breached the insurance contract and Binkowski, Kasmer and Mossburg negligently handled her insurance needs.[2]

The jury found that Binkowski represented to Tabar that the American Family policy would be effective as of December 2, 1991, and that this representation removed the policy's thirty-day waiting period for covered sickness benefits. The jury assigned negligence in the handling of Tabar's insurance application as follows: 65% to Binkowski, 15% to Kasmer and 20% to Tabar. Judgment was entered against Binkowski and American Family on Tabar's negligence claim and against American Family for breach of contract.

SUFFICIENCY OF THE EVIDENCE

A jury verdict will be sustained if there is any credible evidence to support the verdict. ***Radford v. J.J.B. Enters.***, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991).

This is even more true when the trial court gives its explicit

> approval to the verdict by considering and denying postverdict motions. The credibility of the witnesses and the weight afforded their individual testimony are left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict, and we are not to search for evidence to sustain a verdict which the jury could have reached but did not.

Id. (citations omitted).

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[2] The parties later dismissed Mossburg by stipulation.

Applying this standard of review, we conclude that there is credible evidence in the record from which the jury could infer that Binkowski: (1) represented that the American Family policy was effective as of December 2, (2) removed the thirty-day waiting period for covered sickness benefits, and (3) negligently handled Tabar's insurance application.

Mossburg and Tabar testified that they told Binkowski that Tabar was in the grace period of her Mid-America policy. Binkowski denied being told this. However, he agreed that had he known Tabar was in a grace period, he would have been negligent if he failed to advise her to renew the Mid-America policy until the American Family policy took effect.

Scott Cook, who shared office space with Binkowski, recalled that Tabar was in their office on December 2 to complete a health insurance application to replace an expensive Mid-America policy. Cook testified that Mossburg told him that Tabar was in the grace period of her Mid-America policy. After Tabar left Binkowski's office, Cook and Binkowski discussed Cook's interest in selling Mid-America health insurance policies. Binkowski told Cook that he had just sold Tabar an American Family policy which saved her a substantial amount over her Mid-America policy. Based upon this information, Cook decided not to sell Mid-America policies.

American Family argues that there was no credible evidence to support the jury's finding that Binkowski's representation to Tabar that the American Family policy would be effective as of December 2 removed the thirty-day waiting period for covered sickness benefits. American Family misses the thrust of Tabar's claim. Tabar claims Binkowski assured her that she would not experience any lapse in coverage and that her previous coverage would continue. Such coverage would have extended to the aneurysm she suffered.

It was the jury's responsibility to draw reasonable inferences from and resolve conflicts in the evidence adduced at trial. ***Radford***, 163 Wis.2d at 543, 472 N.W.2d at 794. There is evidence in the record that Tabar and Mossburg told Binkowski that Tabar was in a grace period, that Binkowski acknowledged in a conversation with Cook that Tabar was replacing a Mid-America policy, and that Binkowski told Tabar that the policy was effective as

of December 2 and she would therefore not experience a lapse in coverage. This credible evidence sustains the jury's verdict.

In its reply brief, American Family claims that its counsel argued in the trial court "that Binkowski, and insurance agents generally, have no authority to change the terms and conditions of an insurance policy." The record citation provided by American Family does not contain this argument. We will not search the record to verify that this argument was made in the trial court. *See* ***Keplin v. Hardware Mut. Casualty Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964). Therefore, we will not address this contention further. *See* ***Wisconsin Power & Light Co. v. Public Serv. Comm'n***, 171 Wis.2d 553, 572, 492 N.W.2d 159, 166 (Ct. App. 1992), *aff'd*, 181 Wis.2d 385, 511 N.W.2d 291 (1994).

American Family argues that there was no credible evidence to support the jury's verdict attributing 15% negligence to Kasmer. We will sustain the jury's verdict if there is any credible evidence to support it. ***Radford***, 163 Wis.2d at 543, 472 N.W.2d at 794.

The evidence adduced at trial presented a jury question as to whether Kasmer negligently handled Tabar's insurance application. Kasmer signed the application as the agent but never discussed Tabar's insurance needs with her. The jury was instructed that WIS. ADM. CODE § INS 3.27 requires an agent to "make such inquiry as may be necessary under the circumstances to determine that the purchase of such insurance is not unsuitable for the prospective buyer." The jury was also instructed that WIS. ADM. CODE § INS 3.29 requires an agent soliciting the sale of insurance to inform the buyer in writing regarding the problems which can arise when replacement insurance is sought, if the agent is aware that the sale involves replacement coverage.

Although Binkowski did not complete that portion of Tabar's application stating that Tabar was procuring replacement coverage, this did not require taking from the jury the question of whether Kasmer complied with the cited requirements. No one objected to the jury instruction in this regard. The jury's verdict is supported by credible evidence in the record.

PREJUDICIAL TESTIMONY

American Family seeks a new trial because Binkowski was improperly and prejudicially questioned about misconduct and because Jerry Koch, Binkowski's supervisor, and coworker Cook were asked whether they had an opinion of Binkowski's character for truthfulness and veracity.

With regard to whether Binkowski had been "called on the carpet" by an insurer for back-dating applications, Tabar's counsel conceded that the question was improper and the trial court should instruct the jury that the question was premised upon a mistaken understanding of the facts. The jury was then instructed to disregard the question and any implications flowing from it. At that point, American Family withdrew its request for a mistrial due to the improper question. Potential prejudice is presumptively erased when an admonitory instruction is given. *See* ***Sommers v. Friedman***, 172 Wis.2d 459, 467-68, 493 N.W.2d 393, 396 (Ct. App. 1992).

Koch and Cook were questioned regarding their opinions of Binkowski's character for truthfulness and veracity. American Family did not object to these questions. Therefore, the examination cannot be challenged on appeal. *See* ***Wirth v. Ehly,*** 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980).

SPECIAL VERDICT

American Family argues that the special verdict did not track the parties' stipulation regarding the damages recoverable on Tabar's claim that the defendants negligently failed to advise her to renew her Mid-America policy so her insurance coverage would not lapse.

Prior to trial, the parties stipulated to two liability scenarios relevant to the calculation of damages. The first scenario involved American Family owing coverage if its policy was in effect and the thirty-day exclusion period during which Tabar was treated for an aneurysm had been waived. The second scenario governed if the jury concluded that Binkowski was causally

negligent for failing to advise Tabar to renew her Mid-America policy until the American Family policy took effect.

American Family argues that the special verdict questions should have tracked the scenarios in the stipulation rather than ask the jury the less specific question of whether Binkowski and Kasmer negligently handled Tabar's insurance application. American Family claims that the lack of specific special verdict questions makes it impossible to determine what facts motivated the jury to decide that Binkowski and Kasmer negligently handled Tabar's insurance application.

The framing of a special verdict is within the trial court's discretion. ***Murray v. Holiday Rambler, Inc.***, 83 Wis.2d 406, 425, 265 N.W.2d 513, 523 (1978). We will not interfere with the form of a special verdict unless the question, taken with the applicable instruction, does not fairly present the material issues of fact to the jury for determination. *See* ***id***.

From this record, American Family cannot demonstrate that it was prejudiced by the trial court's discretionary framing of the special verdict.[3] Counsels' closing arguments were not recorded.[4] This court cannot know and declines to speculate about how this case was argued to the jury and whether the jury's attention was drawn solely to the question of whether Binkowski and Kasmer failed to advise Tabar to renew her Mid-America coverage or whether Tabar contended that the agents performed negligently in other respects.

Additionally, although the parties stipulated to scenarios of liability and damages, no one objected to evidence of other shortcomings in the manner in which Tabar's insurance application was handled, e.g., Kasmer's

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[3] A new trial may not be granted unless "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." Section 805.18(2), STATS.

[4] In her brief, Tabar states that her attorney specifically argued at closing that other acts of negligence, such as failing to promptly process her application, were not causal of her damages. Because this statement cannot be supported by citation to the record, we disregard it. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

delay in processing the application and Binkowski's failure to answer all of the questions on the application. Therefore, this evidence was in the case for the jury to consider.

Even though we affirm the trial court's discretionary decision to frame the special verdict as it did, we note that it would have been preferable to tailor the special verdict to the liability theories set forth in the stipulation. In this way, the significance of the jury's verdict would have been clearer.

Finally, American Family seeks a new trial. Because we have discerned no reversible error, there is no need for a new trial.

By the Court.—Judgment affirmed.

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