COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP340 **Cir. Ct. No. 2003CV741**

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

JOHN F. KOTTKE, D/B/A JFK TRUCKING, INC.,

PLAINTIFF-RESPONDENT,

V.

COMMERCIAL TRUCK CLAIMS MANAGEMENT, OWNER-OPERATOR SERVICES, INC. AND ALEA LONDON, LTD.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 PER CURIAM. Commercial Truck Claims Management, Owner-Operator Services, Inc., and Alea London Ltd., (collectively "Commercial") appeal a judgment arising out of an insurance claim for damages to a semi truck

owned by John Kottke, d/b/a JFK Trucking, Inc., ("Kottke") when it collided with a deer. The judgment also awarded damages for bad faith in the processing of the insurance claim. Commercial alleges nine errors in the bifurcated trials: (1) improper exclusion of an expert witness; (2) prejudicial error in refusing to allow a defense expert to comment on facts from the first-phase trial; (3) improper "judicial admission" on insurance coverage; (4) prejudicial error by allowing the second-phase jury to consider damages on a supplemental claim; (5) prejudicial error by excluding any reference to resolving the dispute through an appraisal clause, and other evidentiary rulings; (6) submitting the punitive damage claim despite a lack of requisite evidence; (7) denying summary judgment and directed verdict on the bad faith claim; (8) denying a request that the appraisal clause be enforced and the appraisal process be completed by Kottke; and (9) not allowing Commercial the opportunity to examine redacted copies of Kottke's attorney fees to question the reasonableness of such bills. We agree with Commercial that it should have been allowed to examine redacted copies of Kottke's attorney fees. We reject Commercial's arguments on all remaining issues.

¶2 Kottke submitted an estimate in the amount of $7,548.50 for the repair of his semi, prepared by John Widmer of Quality Truck & Equipment, Inc. in Green Bay. Quality Truck was the body shop that performed the majority of customized work for the original owner of the truck. The estimate included application of numerous chrome parts, pin-striping, and application of "chameleon" paint to the front fenders and fuel tank. Because the damage estimate exceeded $5,000, Commercial decided to hire an independent insurance adjuster, William Peck of Great Northern Adjustors. Peck estimated damages of $5,509.02. Peck's estimate did not include the cost for repair/replacement of custom parts, paint, and labor because Commercial told him the policy did not

cover such costs. Peck's testimony revealed that his estimate would have increased by approximately one-third if the cost of such customization was included. If customization costs were added to Peck's estimate, it would actually exceed Widmer's estimate. Peck also testified that he found Widmer's estimate to be fair and reasonable.

¶3 Commercial's claims office manager, Charles Johnston, responded to Peck's estimate by suggesting to Peck that Kottke had not hit a deer. Johnston also accused Peck of not having seen the truck, when in fact Peck had taken photographs and sent them to Johnston previously. Johnston also called Peck "completely incompetent." Peck testified that Commercial had not in the three years prior to trial paid his invoice for services rendered.

¶4 Without explanation to Kottke, Commercial issued a check in the amount of $4,074.87, which included a $1,000 deductible. When Kottke called to question the amount, he was told to return the draft and his claim would be reconsidered. One week later, without any explanation of the method employed in readjusting the claim, Commercial issued a new check, but this time in the amount of $2,625.33.

¶5 Kottke thereafter asked to speak to the manager of the claims department, and was directed to Johnston, who told him "I don't have to pay for all the … fancy paint and chrome stuff that you have on your truck." Johnston further stated, "If you don't like it, that's tough shit." Commercial advised Kottke that his recourse would be to demand appraisal. Kottke requested appraisal on December 19, 2002, naming John Widmer as his appraiser. Commercial named Douglas Stonehocker as their appraiser. Stonehocker inspected the truck in late

January 2003, and estimated damages at $4,074.35. The appraisers were thereafter unable to agree on the appointment of an umpire.

¶6 Pursuant to the appraisal clause, "on the request of the Insured or Insurers" an umpire would be appointed by the court. Kottke declined to invoke this option and Commercial failed to respond to a letter dated April 9, 2003 from Kottke inquiring whether Commercial was prepared to petition the court for an umpire. Kottke filed suit on June 23, 2003.

¶7 The circuit court bifurcated the breach of contract and bad faith claims. A jury awarded Kottke $7,000 for the damages to his vehicle. The bad faith trial commenced on September 20, 2005. On September 12, Commercial disclosed that it planned to call Stonehocker as a bad faith expert. The court concluded his testimony on the appropriateness of the appraisal was an unfair surprise to Kottke and further that it was not corroborative of the information available to Commercial at the time it tendered the payments to Kottke. The court therefore excluded Stonehocker as a witness in the bad faith trial. Two business days before trial, Commercial produced a supplemental report of its bad faith expert, James Fox. The circuit court restricted Fox from testifying as to the supplemental report, which the court concluded was "disclosed at the last minute."

¶8 On the first day of the bad faith trial, Kottke called as his first witness Chuck Johnston, adversely. Johnston testified inconsistent with his deposition testimony, and his testimony in the first trial, as to whether the policy provided coverage for custom parts. The court instructed the jury to "disregard Mr. Johnston's testimony in this trial wherein he now claims that coverage for custom paint, parts and labor is not available to Mr. Kottke."

¶9 The jury determined Commercial acted in bad faith and awarded $115,000 in punitive damages. The circuit court granted Kottke's request for attorney fees, costs and expenses exceeding $80,000, and interest on the verdict exceeding $8,000. Commercial now appeals.

¶10 First, Commercial argues the circuit court erred in excluding the testimony of Stonehocker during the bad faith trial. Commercial insists that Stonehocker was prepared to offer opinions that the damage claims were debatable. Commercial insists it disclosed Stonehocker as an expert witness "long before the trial." Commercial also notes that no pretrial order limited the scope of an expert's testimony.

¶11 Whether to permit the testimony of a witness is generally within the discretion of the circuit court. ***Milwaukee Rescue Mission, Inc. v. Milwaukee Redev. Auth.***, 161 Wis. 2d 472, 490, 468 N.W.2d 663 (1991). Here, the court concluded the parties had "implicitly acknowledged that their conduct with regard to discovery and disclosure issues would be governed by a test of reasonableness." The court acknowledged that Stonehocker was identified earlier in the proceedings, but also noted that Stonehocker testified in the first trial as to the appraisals and the damages as he examined them. The court stated that it would not allow Stonehocker to testify as to the bad faith issues:

> If he expresses any opinions in that respect, I think that is significantly separate and distinct from what he may have testified to at the earlier phase of these proceedings, and I see nothing in any of the records or any of this presentation to this Court to suggest that Mr. Konz was ever alerted to the fact that Mr. Stonehocker was—would be used in the manner suggested, in the manner that he would be used today.

¶12 We conclude the circuit court reasonably exercised its discretion in precluding the expert testimony of Stonehocker in the bad faith trial. The court is allowed to exclude evidence if its probative value is outweighed by the risk that its admission will unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered. ***Milwaukee Rescue Mission***, 161 Wis. 2d at 492. Although the circuit court did not fully address the probative value of Stonehocker's testimony, our independent review of the record supports the court's conclusion that the unfair surprise to Kottke justified the exclusion of the testimony. *See* ***id.***, n.9.

¶13 Similarly, Commercial insists the circuit court erred by restricting the supplemental report of Fox. Commercial reiterates the absence of a discovery deadline or a limitation on what information expert witnesses could review prior to trial. We reject Commercial's argument. Again, we note the court's conclusion that the parties had implicitly acknowledged that their conduct would be governed by the test of reasonableness. Fox's supplemental report was produced on Friday, September 16, 2005, just two working days prior to the commencement of the bad faith trial. The court found it unreasonable to disclose new expert opinions on the eve of trial when the information contained within the expert's supplemental report was available since the time of the first trial, nearly three months earlier. As the court stated in an order on September 13, 2005:

> [A]ll discovery on matters at issue should have been completed well in advance of the last several weeks. Trial is scheduled to commence on September 20 and the material and information sought to be discovered are materials and information that could have been inquired into well in advance of a timeframe just before trial.
>
> The court is of the opinion that such discovery efforts at this late stage is [sic] beyond the time previously allowed and is burdensome and unduly oppressive to plaintiff.

¶14 We conclude the court's exclusion of Fox's untimely report was in accord with well-established rules regarding disclosure and discovery. Fox was properly precluded from giving testimony concerning a report disclosed only two working days before trial.

¶15 Commercial next insists the circuit court erred by instructing the jury to disregard Johnston's change in testimony, and consider as a matter of fact that the jury in the first trial had concluded coverage for custom parts, paint and labor was available under the policy. Commercial contends that Johnston "clarified his testimony" in the bad faith trial based on a "complete and thorough review of the three-page truck proposal." Commercial further asserts the "fact that a witness gives differing opinion testimony based on a review of different pages of an insurance contract should not be grounds for the trial court to give a forced instruction that erroneously portrays facts and creates a legal fiction." Commercial contends the circuit court should have responded to Johnston's inconsistent testimony by allowing full cross-examination, rather than an improper "judicial admission." We are unpersuaded.

¶16 On the first day of the bad faith trial, Kottke called Johnston as his first witness, adversely. Johnston testified at the bad faith trial that the insurance policy did not provide coverage for custom parts. Johnston further testified that two months prior to the bad faith trial he informed his attorney, Vincent Biskupic, of his plans to change his testimony. Biskupic failed to make pretrial disclosure of this change in Johnston's testimony.

¶17 A substantial delay ensued as the circuit court called in a second reporter for the purpose of transcribing Johnston's testimony in the first trial. The

court also reviewed references to Johnston's deposition, where Johnston testified as follows:

> Q: In terms of the policy, does it have an exclusion for custom parts or custom paint?
>
> A: No.
>
> Q: Do you exclude custom parts or custom paint when you're considering claims under the property damages policy?
>
> A: No.
>
> Q: Did you do so in this case?
>
> A: No.
>
> ….
>
> Q: (By Mr. Konz) Just so I'm clear on something, Mr. Johnston, its your testimony in this case that Mr. Kottke's insurance policy as issued to him would provide coverage for custom parts and custom paints, true?
>
> A: Yes.

¶18 After reviewing the testimony from the first trial, and the references to Johnston's deposition, the court concluded that Johnston had testified the policy did not exclude custom parts from coverage. The court stated:

> Good, bad or indifferent, that's how the case was presented in front of the jurors. The policy, the proposal, which has attached to it the RMK001 attachments, and all of that was available to counsel for both sides of the aisle, and nobody corrected those presumptions or assumptions on parts and how we proceeded with the earlier trial.
>
> The jurors considered custom parts. They were permitted to do so, because of that fact. And they indeed in their verdict had to have, I think, included some, if not most of the custom parts in their determination of the ultimate award. And therefore, we would end up with the potential of inconsistent verdicts if we now allow the jurors to consider the availability of coverage for custom paint and

> parts and labor or the unavailability of same in their analysis of whether there was bad faith in this case.
>
> So either we mistrial this case altogether and start over from the beginning, or we attempt to continue the inadvertent figures that was created by relying upon the original verdict and see what we can do here today.
>
> The latter is what I think we need to do.

¶19 The court again noted an ongoing obligation for continued disclosure. The court stated that it was certainly "a surprise to Mr. Konz as it was to the Court when I heard that testimony … but anyway, that wasn't reported, and it is a violation, I believe it was, of the discovery statutes." The court concluded there was "a very significant potential for prejudice as a result of that inconsistent position."

¶20 Thus, contrary to Commercial's perception, the court's remedy was not "a forced judicial admission of law," but rather the court concluded it was necessary to instruct the jury to remedy Johnston's material change in testimony, the violation of discovery law in failing to disclose the change in testimony, and the significant prejudice to Kottke if Johnston were allowed to reverse an answer to what previously the court determined had been undisputed evidence. The court did not erroneously exercise its discretion in that regard.

¶21 Commercial next argues the circuit court erred by allowing the bad faith jury to consider damages incurred by Kottke on a "separate claim." Commercial contends the jury was allowed to consider "other acts evidence" because the "separate claim" should have had no bearing on the bad faith analysis.

¶22 Commercial proceeds under invalid premises. The "separate claim" referred to by Commercial was in fact a supplemental appraisal of damages dated February 13, 2003. Kottke alleged that as a result of Commercial's refusal to

make full payment, and his inability to afford to have the repairs fully completed, the ill-fitting hood rubbed against several other engine components resulting in additional damages of approximately $1,400. Commercial also incorrectly characterizes this supplemental damage appraisal as "other acts evidence." Rather, it was a part of the claim for damages in the first trial. As the circuit court noted, the $1,400 supplemental claim was arguably part of the jury verdict.

¶23 Kottke contends that Commercial did not object to the form of the verdict in the first trial when the jury was asked to consider two appraisals pertaining to the same loss (i.e., the appraisal of $7,457 and the supplemental appraisal of $1,400). Commercial does not reply to this argument and thus it is deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Because Commercial did not request the first phase jury to make further findings of fact or itemize the amount awarded for repair of damages, it waived its right to complain.

¶24 Commercial next argues the circuit court erred by excluding any reference to Kottke's "rights under the appraisal process." Commercial insists Kottke had the option to "appeal the disputed claim through an independent appraisal process without the need for litigation." Commercial notes that Kottke invoked the appraisal process under the policy, and each party denominated an appraiser. According to Commercial, Kottke "then unilaterally made the decision to abandon the appraisal process and put this case into litigation." Commercial claims this evidence was relevant to rebut a bad faith claim.

¶25 Commercial again proceeds under an invalid premise. Kottke did not unilaterally make a decision to abandon the appraisal process. The appraisal clause provided, "on the request of the Insured or Insurers" an umpire would be

appointed by the court. This clause merely presented the parties with an option; it did not require appraisal. Kottke declined to invoke the option to have an umpire appointed, but Commercial also failed to respond to a letter dated April 9, 2003 from Kottke inquiring whether Commercial was prepared to petition the court for an umpire. Kottke then filed suit on June 23, 2003. Kottke did not "abandon the appraisal process and put this case into litigation."

¶26 As the court stated:

> I agree. I think the fact that there is a potential or possible appraisal process that the insured can avail himself or herself of does not obviate the responsibility of the insurer in the first instance to negotiate in good faith, and the good faith obligation requires the insurer to evaluate the claim itself and determine the reasonableness of whether it should or shouldn't be paid, and anything outside of that narrow consideration by the jurors I think is not relevant or material.

¶27 Commercial also insists the court erred by denying its request to refer this matter back to the appraisal process. Fourteen months after Kottke commenced suit, and two days before the final pretrial conference, Commercial moved the court to order appraisal. Commercial contends, "[t]he appellate court should review de novo the request to enforce the appraisal process." Commercial cites no authority to support its contention and we consider the argument inadequately briefed. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶28 Commercial contends the circuit court made additional evidentiary errors. Commercial argues the court improperly allowed Kottke to claim that his insurance premiums were approximately $7,000-$8,000 when they were only approximately $1,554. Commercial also argues the court also allowed Kottke to present evidence concerning the content of a civil complaint filed on June 23,

2003. Finally, Commercial argues the court erroneously ruled Commercial could not present evidence from witness Robert Jansen who examined the truck's transmission. Commercial claims "[t]hese erroneous and highly prejudicial rulings served to inflame the jury and also prohibit the insurers from trying the full controversy of the case." Commercial does not specify how these rulings inflamed the jury or prevented the case from being fully tried, and we will not abandon our neutrality by developing these arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶29 Commercial next argues the circuit court erroneously submitted the punitive damages claim to the jury without the requisite evidence. Commercial asserts, "[t]he only evidence presented by the insured to suggest a basis for punitive damages was what the trial court described as a 'callous' comment by Charles Johnston in a telephone conversation with the insured…." Commercial insists a callous comment by a claims supervisor may be bad customer service, but it does not support a finding of punitive damages.

¶30 According to Wisconsin law, an award of punitive damages in a particular case is within the discretion of the jury and we are reluctant to set aside an award merely because it is large or we would have awarded less. ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997). If there is any credible evidence which reasonably supports a jury's findings, those findings will not be overturned. ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 782, 541 N.W.2d 203 (Ct App. 1995). Further, in reviewing a punitive damage award in a bad faith insurance case, the evidence must be viewed in the light most favorable to the plaintiff. ***Trinity Evangelical Luth. Church v. Tower Ins. Co.***, 2003 WI 46, ¶56, 261 Wis. 2d 333, 661 N.W.2d 789.

¶31 In the light most favorable to Kottke, the jury could reasonably view Johnston's comments that "I don't have to pay for all the … fancy paint and chrome stuff that you have on your truck," and "If you don't like it, that's tough shit" as more than a callous comment. Moreover, to characterize Johnston's comment as the only evidence of punitive damages is a misrepresentation of the record. Here, the two checks issued by Commercial (i.e., $4,074.87 and $2,625.33) were inconsistent with each other and unsupported by any explanation of the adjustment process. Conversely, the two estimates by Widmer and Peck were consistent with and corroborated each other. In addition, Johnston took inconsistent positions on whether the policy provided coverage for custom parts, paint and labor. On the basis of this evidence alone, there was more than an ample basis to support the claims for bad faith and punitive damages. The jury findings that Commercial failed to properly investigate and review the loss will not be overturned.

¶32 This evidence also critically undercuts Commercial's argument that the circuit court erred by denying Commercial's motions for summary judgment and directed verdict on the bad faith claim. Commercial asserts that once the jury in the first trial determined the cost to repair at $7,000, the circuit court "should have found the initial claim 'debatable' or 'questionable' as a matter of law based on the fact that he was only awarded approximately 50% of his claims from November-December 2002." Commercial is mistaken. The evidence set forth in the preceding paragraph was sufficient to support the court's decision to deny summary judgment or directed verdict as a matter of law.

¶33 Commercial also contends the punitive damages award was excessive and violates due process. Commercial argues the United States Supreme Court expressed suspicion of double-digit ratios between the award in

the underlying trial and the punitive damage award. *See* ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 425 (2003). However, the ratio is but one factor in assessing the reasonableness of a punitive damage award. ***Jacque***, 209 Wis. 2d at 629-30. Here, the circuit court properly concluded the punitive damage award was reasonable considering the totality of the circumstances. Moreover, the award is not inconsistent with other punitive damage awards upheld in Wisconsin. *See, e.g.*, ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶¶21-22, 280 Wis. 2d 193, 694 N.W.2d 467 (compensatory damages of $12,000 and punitive damages of $375,000); ***Strenke v. Hogner***, 2005 WI App 194, ¶¶24-26, 287 Wis. 2d 135, 704 N.W.2d 309 (compensatory damages of $2,000 and punitive damages of $225,000).[1] As we also noted in ***Strenke***, the Seventh Circuit Court of Appeals has upheld double-digit awards. ***Id.***, ¶25 n.15.

¶34 Finally, Commercial contends the court erred by not allowing it to examine redacted copies of Kottke's attorney fees bills to question the reasonableness of the bills. We agree. Several factors are considered when determining the reasonableness and necessity of attorney fees. *See* ***Jensen v. McPherson***, 2004 WI App 145, ¶39, 275 Wis. 2d 604, 685 N.W.2d 603. Kottke offers no reasonable explanation of how fees can be adequately challenged by the opposing party without the opportunity to review the type of work performed by the attorney, how much time was spent on each item of work and who performed

[1] We noted in ***Strenke v. Hogner***, 2005 WI App 194, 287 Wis. 2d 135, 704 N.W.2d 309, that although the majority in ***State Farm*** said "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," that remark is dicta and not, as the holding makes clear, a new single-digit rule. ***Strenke***, 287 Wis. 2d 135, ¶17 n.8 (quoting ***State Farm Mut. Auto. Ins. Co. v. Campbell***, 538 U.S. 408, 525 (2003)).

the work. Kottke's attorneys may redact from their time records any evidence that would invade the attorney-client privilege.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded. Costs denied to both parties.

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