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**STATE OF MINNESOTA
IN COURT OF APPEALS**

C3-95-2152

Robert William Foss,

Appellant,

vs.

State Farm Mutual Automobile Insurance Company,

an Illinois corporation,,

Respondent,

LaBore & Giuliani, Ltd.,

Defendant.

Filed November 12, 1996

Reversed and Remanded

Schumacher, Judge

Hennepin County District Court

File No. 9310768

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Considered and decided by Norton, Presiding Judge, Schumacher, Judge, and Harten, Judge.

U N P U B L I S H E D O P I N I O N

SCHUMACHER, Judge

Appellant Robert William Foss contends the trial court abused its discretion when reconciling an inconsistent verdict. We reverse and remand for entry of judgment in conformity with this opinion.

FACTS

In December 1986, Laura Stalberger was injured when Foss's vehicle rear-ended a vehicle she was driving. Respondent State Farm Mutual Automobile Insurance Company insured Foss under an auto liability policy with limits of \$100,000 per person. Stalberger attempted to settle her personal injury claim within policy limits. Efforts failed, and she proceeded to trial. The jury awarded her \$581,300 in damages, which the trial court reduced to \$254,478.58.

Foss assigned to Stalberger his claims of breach of contract, consumer fraud, and bad faith against State Farm and legal malpractice and breach of fiduciary duty against LaBore & Giuliani, the law firm hired by State Farm to represent Foss in the underlying action. Stalberger initiated the suit in Foss's name.

At trial, the court submitted to the jury the issues of bad faith, causation, and damages. By special verdict, the jury found:

5. Did State Farm Mutual Automobile Insurance Company act in bad faith against Robert Foss?

Yes No

6. If your answer to question 5 was "Yes", then answer this question: Was such bad faith a direct cause of damage to Robert Foss?

Yes No

Regardless of how you answered Questions 1-6, you must answer the following questions.

7. What sum of money will fairly and adequately compensate Robert Foss for damages up to the date of this verdict directly caused by defendant's conduct for:

a. Plaintiff Foss's personal exposure to pay the judgment for Stalberger obtained in the underlying matter, if any:

\$ 0.00 (zero)

b. Plaintiff Foss's actual harm to credit and reputation, if any:

\$ 1.00 (One)

c. Plaintiff Foss's legal fees owed to attorney Howard Helgen?

\$ 1500.00 (One thousand, five hundred).

The parties brought posttrial motions for amended findings, new trial, and judgment notwithstanding the verdict (JNOV). The trial court issued an order in which it amended the verdict by changing the answer to Question 6 from "Yes" to "No" because of the jury's zero damage calculation in Question 7a. Foss appeals.

DECISION

Foss contends the trial court erred by submitting the damage issue to the jury. We agree.

The jury found by special verdict that State Farm "act[ed] in bad faith against Robert Foss." The jury also found that "such bad faith [was] a direct cause of damage to Robert Foss." These factual determinations of bad faith and causation rest within the province of the jury. *Strand v. Travelers Ins. Co.*, 300 Minn. 311, 311, 219 N.W.2d 622, 622 (1974) (where jury found bad faith, court affirmed,

finding sufficient evidence to support verdict); ***Block v. Target Stores, Inc.***, 458 N.W.2d 705, 712 (Minn. App. 1990) (causation is factual question for jury to decide), ***review denied*** (Minn. Sept. 28, 1990).

The damage question in this case is well settled by law in this state: the measure of damages in a third-party bad faith action against an insurer is the difference between the policy limits and any excess verdict awarded in the underlying action. ***Short v. Dairyland Ins. Co.***, 334 N.W.2d 384, 385 (Minn. 1983); ***Strand***, 300 Minn. at 311, 219 N.W.2d at 622.^[1] Consequently, the trial court erred when it submitted the damage question to the jury. The damages in this case are the difference between the \$100,000 policy limits and the \$254,478.58 verdict in the underlying action.

In its notice of review, State Farm contends the trial court abused its discretion by denying JNOV, claiming there is insufficient evidence of bad faith. When reviewing the denial of JNOV, "we must affirm if there is any competent evidence reasonably tending to sustain the verdict." ***Retzman v. City of Litchfield***, 354 N.W.2d 426, 429 (Minn. 1984). The record reveals ample evidence to support the verdict, including State Farm's failure to (1) inform Foss fully about settlement negotiations, (2) inform Foss of the extent of Stalberger's wage loss claim and her claim that she anticipated problems with childbirth, and (3) hire experts to rebut Stalberger's wage loss claim and properly inform the expert medical witness about the extent of Stalberger's injuries. ***See Short***, 334 N.W.2d at 389 (insurer has duty to keep insured informed of all proceedings, including offers to settle).

We reverse and remand to allow the trial court to reinstate the jury's finding and to calculate damages consistent with this opinion.

Reversed and remanded.

^[1] Our ruling incorporating the settled rule of law on the calculation of damages issue obviates any discussion of State Farm's notice of review regarding a new trial on the basis of damages.