

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PELICAN BAIT, INC., et al., : CIVIL ACTION
 : NO. 99-468
 Plaintiffs, :
 :
 v. :
 :
CNA INSURANCE CO., :
 :
 Defendant. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

AUGUST 1, 2000

Plaintiffs Pelican Bait, Inc. and R.J. Darigo, Inc., the named insureds of a commercial property insurance policy issued by defendant CNA Insurance ("CNA"), brought this civil action against CNA claiming that CNA breached the terms of the insurance policy. At trial, plaintiffs contended that CNA breached the terms of the policy by failing to reimburse plaintiffs for losses they allegedly sustained to their cold storage building as a result of a rain and wind storm. Plaintiffs further asserted that CNA's refusal to reimburse them for the losses constituted bad faith. In defense of plaintiffs' claim, CNA argued that the damage sustained by plaintiffs' building was not due to a rain and wind storm but rather due to a condition known as "frost heave," the resulting damage of which was excluded under the terms of the policy. The parties agreed that damages caused by a rain and wind storm were covered under

the terms of the policy. The issue at trial was whether the loss was caused by the rain and wind storm as claimed by plaintiffs.

After a four-day trial, the jury was asked to answer the following interrogatories:

(1) Do you find that the plaintiffs have proven by a preponderance of the evidence that the damage sustained by the plaintiffs' building was caused by the rain and wind storm that occurred on or about January 28, 1997?

(2) Do you find that the plaintiffs have proven by clear and convincing evidence that the defendant acted in bad faith by denying coverage for the damages incurred by the plaintiffs without a reasonable basis, and that defendant knew or recklessly disregarded that it lacked a reasonable basis to do so?

The jury answered "yes" to the first interrogatory and "no" to the second. Accordingly, the court entered judgment for plaintiffs on the breach of contract claim in the amount of the insurance claim, \$339,982.04, and for defendant on the bad faith claim.

Presently before the court is CNA's motion for judgment as a matter of law or, in the alternative, for a new trial or remittitur of the verdict and plaintiffs' response thereto. CNA asserts five separate arguments in its post-trial motion. First, CNA claims it is entitled to judgment as a matter of law or, alternatively, a new trial because the verdict was against the weight of the evidence. Specifically, CNA argues that plaintiffs did not meet their burden of proving CNA had breached the

insurance contract because plaintiffs did not prove that the damage to the building was caused by a rain and wind storm. Second, CNA maintains that it is entitled to judgment as a matter of law or, alternatively, to a new trial because the court improperly submitted the issue of bad faith to the jury, which resulted in a compromise verdict. Third, CNA claims that it is entitled to a new trial because the court improperly dismissed a juror from the jury panel. Fourth, CNA seeks a new trial limited to determining damages. Finally, CNA seeks a remittitur of the damages award in this matter claiming that the award is excessive. The court will address each argument in turn.

I. JUDGMENT AS A MATTER OF LAW

A. Legal Standard

Upon renewed motion for judgment as a matter of law, a court may allow the judgment to stand, order a new trial, or direct entry of judgment as a matter of law. See Fed. R. Civ. P. 50(b)(1).¹ Judgment as a matter of law may be granted only if

1. Federal Rule of Civil Procedure 50 provides in pertinent part:

(a) (1) If during a trial by a jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without

(continued...)

"there is no legally sufficient evidentiary basis for a reasonable jury" to find in favor of the nonmoving party. See Fed. R. Civ. P. 50(a). In reviewing a motion for judgment as a matter of law, a court must view the evidence in the light most favorable to the nonmoving party, and "every fair and reasonable inference" must be drawn in that party's favor. McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995).

B. Waiver

CNA moved for judgment as a matter of law pursuant to Rule 50(a) on both the breach of contract and the bad faith claims at the close of plaintiffs' case. See Tr. 1/18/00 at 140-52. After argument, the court denied CNA's motion. See Tr. 1/19/00 at 3. CNA then proceeded to put on evidence of a

1. (...continued)

a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment.

(b) If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment -- and may alternatively request a new trial or join a motion for a new trial under Rule 59.

Fed. R. Civ. P. 50(a)-(b).

defense. At the close of all the evidence, however, CNA renewed its Rule 50(a) motion only as to plaintiffs' bad faith claim but not as to plaintiffs' breach of contract claim.² See Tr. 1/20/00 at 125-26. The court reserved its ruling until after the jury's verdict. Id. at 26.

Rule 50 provides that the court cannot enter judgment as a matter of law with respect to a claim or defense unless the moving party made a motion for judgment on that specific issue at the close of all the evidence. Yohannon v. Keene Corp., 924 F.2d 1255, 1261-62 (3d Cir. 1991); Gebhardt v. Wilson Freight Forwarding Co., 348 F.2d 129, 132 (3d Cir. 1965). "[T]he introduction of evidence after the denial of a motion for directed verdict constitutes a waiver of the error, if any, in the denial unless the motion is renewed at the close of all the evidence." Gebhardt, 348 F.2d at 132; see also Greenleaf v. Garlock, Inc., 174 F.3d 352, 364 (3d Cir. 1999) ("It is well settled that a party who does not file a Rule 50 motion for judgment as a matter of law at the end of the evidence is not thereafter entitled to have judgment entered in its favor notwithstanding an adverse verdict on the ground that there is insufficient evidence to support the verdict."). CNA's failure to renew its motion for judgment as a matter of law with respect

2. CNA concedes this in its post-trial motion. See Mem. of Law in Support of CNA's Post-trial Mot. at 10.

to plaintiffs' breach of contract claim "operates as a waiver with fatal consequences to its [present] insufficiency of the evidence claim" See Greenleaf, 174 F.3d at 365.

Accordingly, CNA's motion for judgment as a matter of law based upon the alleged insufficiency of the evidence to support plaintiffs' breach of contract claim must be denied.³

C. Proof of a Breach of Contract

Even if CNA's failure to renew its Rule 50(a) motion with respect to plaintiffs' breach of contract claim at the close of all the evidence could be excused, the court finds that CNA's motion would still fail. CNA first argues that the plaintiffs did not present sufficient evidence to enable the jury to find, as plaintiffs claimed, that the damage to plaintiffs' building was caused by a rain and wind storm, which made the roof rise, allowing water to seep down the sides of the building resulting in the buckling and displacement of the floors and walls.

Rather, CNA contends that the evidence it offered at trial showed

3. The court recognizes that some circuits have relaxed the requirement that a party renew a Rule 50(a) motion at the close of all the evidence. For example, courts have excused a party's failure to renew the Rule 50(a) motion where the court had indicated during the trial that a renewal of the motion was unnecessary or where the moving party did not present any evidence or insubstantial evidence in its case relating to the subject of the Rule 50 motion. See Larami Corp. v. Amron, No. CIV.A. 91-6145, 1995 WL 128022, at *2 (E.D. Pa. Mar. 23, 1995) (discussing line of cases applying relaxed standard). However, even if the court had the power to relax the harsh consequences flowing from a failure to timely renew a Rule 50(a) motion, CNA has expressed no reason why the court should do so in this case.

that the damage to the roof, walls, and floor was caused, not by a windstorm, but by a condition known as "frost heave,"⁴ damages from which are not covered under the insurance policy. At trial, CNA maintained that the frost heave was caused by plaintiffs' poor construction of the cold storage room roof and the lack of insulation beneath the floor.⁵ According to CNA, the ice caused by the frost heave expanded, displacing the floors and walls, and consequently raising the roof, which allowed water to seep into the building during the rainstorm, causing more damage.

In its motion for post-trial relief, CNA contends that to prove their theory of causation of the damage to the roof, plaintiffs were required to submit expert testimony to aid the jury. CNA argues that the only expert witness that plaintiffs presented was Frederick Dotts, a mechanical engineer who was qualified to testify as to refrigeration, heating, and air conditioning ventilation. At the voir dire of Mr. Dotts, the court concluded that Mr. Dotts could not testify as to how the roof became damaged, i.e., that it was due to a rain or wind storm. Accordingly, CNA argues, because no "expert" testified

4. Frost heave occurs when water vapor collects underneath the floor, freezes due to falling temperatures, forms ice, and expands.

5. Plaintiffs used the cold storage room to store frozen fish and bait products.

that the rain and wind storm damaged the roof, the jury's verdict was contrary to the evidence.

At trial, plaintiffs bore the burden of proving by a preponderance of the evidence that they submitted a claim within the coverage provided by the policy and that the CNA breached its duty to pay the claim by denying coverage. See Miller v. Boston Ins. Co., 218 A.2d 275, 277 (Pa. 1966); see also Riehl v. Travelers Ins. Co., 772 F.2d 19, 23 (3d Cir. 1985). Thus, to recover, plaintiffs had to show that the damage was caused by the rain and wind storm, which allegedly occurred on or about January 28, 1997. The court so instructed the jury as to this burden of proof. See Tr. 1/21/00 at 93.

Plaintiffs did offer sufficient evidence in support of their version as to the cause of the damage, evidence which CNA seemingly ignores in its motion. Plaintiffs first introduced the climatological report for January 28, 1997 (three days before plaintiffs noticed any problems with the building), which reported a wind and rainstorm on that date with winds reaching thirty-three miles per hour. See Pls.' Ex. 9. Next, Robert J. Darigo, the owner, testified that he had been up on the roof of the building on January 22, 1997 to perform his periodic inspection of the freezer units maintained on the roof of the building and did not observe any damage to the roof. See Tr. 1/6/00 at 56-62. Mr. Darigo further testified that when he next

went up on the roof on January 31, 1997, three days after the storm, he noticed that there were four to six areas of upheaval of material on the roof that had not been there earlier, which he identified for the jury using contemporaneously-taken photographs. Id.; see also Pls.' Exs. P-3, P-4, P-6, P-7, P-8.

To establish causation, plaintiffs also offered the testimony of George Stafford, plaintiffs' public adjustor, and Anthony Scornaienchi, a roofer.⁶ Mr. Stafford testified that he

6. In arguing that plaintiffs did not present any "expert" testimony as to causation, CNA ignores the testimony of Mr. Stafford and Mr. Scornaienchi. At trial, CNA did not object to either Mr. Stafford's or Mr. Scornaienchi's opinion as to the cause of the roof damage. Thus, any objection as to their opinion testimony is waived. See Grace v. Mauser-Werke GmbH, 700 F. Supp. 1383, 1388 (E.D. Pa. 1988) (stating that because plaintiff's counsel did not object to specific questions asked of expert at trial, objections are waived); see also Government of the Virgin Islands v. Archibald, 987 F.2d 180, 184 (3d Cir. 1993) ("If a party fails to object in a timely fashion, the objection is waived and we will review the admission of evidence only for plain error."). Moreover, even if CNA had objected to the opinions offered by these two witnesses, the testimony would have been admissible as the opinion of lay witnesses. See Fed. R. Evid. 701 (permitting opinion testimony from lay witnesses based on their perception that are helpful in determining a fact at issue); see also Fed. R. Evid. 704 (authorizing admission of opinions of lay witnesses regarding ultimate issues to be decided by trier of fact). Rule 701 of the Federal Rules of Evidence has been construed "to permit individuals not qualified as experts, but possessing experience or specialized knowledge about particular things, to testify about technical matters that might have been thought to lie within the exclusive province of experts." Asplundh Mfg. Div. v. Benton Harbor Engineering, 57 F.3d 1190, 1193 (3d Cir. 1995). A "proponent of technical lay opinion testimony must [only] show that the testimony is based on sufficient experience or specialized knowledge and also show a sufficient connection between such knowledge or experience and the lay opinion such that the testimony may be fairly considered (continued...)

went on to the roof with Mr. Darigo on January 31, 1997, and also observed that part of the roofing material was raised. Mr. Stafford further testified that in his seven years as a public adjustor, he had, on many occasions, witnessed similar damage at other commercial properties that was attributable to wind storms.⁷ Tr. 1/6/00 at 179-81; Tr. 1/18/00 at 6.

6. (...continued)
to be 'rationally based on the perception of the witness' and truly 'helpful' to the jury." Id. The rational basis prong requires only that the witnesses' opinion be "grounded in either experience or specialized knowledge." Id. at 1198; see also Wilburn v. Maritrans GP, Inc., 139 F.3d 350, 355-56 (3d Cir. 1998) (discussing Asplundh). The testimony of both Mr. Stafford and Mr. Scornaienchi, based on the combination of their extensive practical experience (Mr. Stafford having been a public adjustor for commercial properties, inter alia, for seven years and Mr. Scornaienchi having been employed as a roofer for twenty-eight years) and their personal observations of the roof of plaintiffs' building shortly after the damage was noticed, satisfy those requirements. Cf. Malloy v. Metalcraft of Mayville, Inc., No. CIV.A. 96-1581, 1997 WL 269581, at *7 (E.D. Pa. May 14, 1997) (finding engineer who possessed sufficient practical knowledge and had personally inspected the product in question qualified to offer lay opinion), aff'd, 141 F.3d 1154 (3d Cir. 1998); see generally Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 404 (3d Cir. 1980) (noting essential difference between lay and expert opinion evidence is that expert witness may answer hypothetical questions, whereas lay witness may testify only from facts perceived by him, not those "made known to him at or before the hearing").

7. Defense counsel later objected to Mr. Stafford's qualifications to opine specifically whether wind gusts of thirty-three miles per hour could cause such damage. See Tr. 1/6/00 at 182-84. The court sustained that objection. Id. Of course, the issue at trial was whether the damage to plaintiffs' building that Mr. Stafford observed was consistent with damage to other buildings caused by wind that he had previously observed, not whether this damage had been caused by a storm with winds reaching thirty-three miles per hour.

In addition, Mr. Scornaienchi,⁸ a roofer with over twenty-eight years of experience in roof repair, testified that he inspected the roof on January 31, 1997, three days after the storm, at the request of Mr. Darigo. When asked if he believed, based on his experience in the roofing industry, whether the damage to the roof was caused by wind, Mr. Scornaienchi replied, "Most definitely." See Tr. 1/18/00 at 35. Mr. Scornaienchi further testified that he had previously seen wind storm damage on other commercial buildings and that such damage closely resembled the damage that he observed when he went up onto the roof of plaintiffs' building.

Finally, plaintiffs introduced the evidence of Mr. Dotts. Although Mr. Dotts could not and did not testify as to the cause of the roof's damage, he did testify that, in his opinion as a refrigeration expert, the damage to the floors and wall was not caused by frost heave. See Tr. 1/18/00 at 62-63. Thus, not only was there evidence in support of plaintiffs' theory of causation, there was expert evidence that refuted CNA's theory of causation.

Essentially, CNA is arguing that the jury improperly attributed more weight to plaintiffs' witnesses' testimony than that of its own experts, Russ Daniels and Keith Shollenberger.

8. On direct, plaintiffs' counsel addressed Mr. Scornaienchi by his trade name, Anthony SanMartino.

It is the jury's function and not the court's to assign weight to all testimony, including expert testimony. See generally Breidor v. Sears, Roebuck & Co., 722 F.2d 1134, 1138-1139 (3d Cir. 1983) (stating that where there is some logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the judge). Moreover, the court provided the jury with, inter alia, a general instruction on assessing the credibility of witnesses and also an instruction setting forth plaintiffs' burden of proof, and CNA does not challenge their legal correctness. See Tr. 1/21/00 at 87-91, 93.

Drawing all fair and reasonable inferences in plaintiffs' favor, the court concludes that there is a legally sufficient evidentiary basis for the jury's finding that the damages to plaintiffs' property were caused by a rain and wind storm. Accordingly, the court declines to disturb the jury's verdict.

D. The Issue of Bad Faith

CNA next argues that the court's submission to the jury of plaintiffs' bad faith claim resulted in a compromise verdict on liability. CNA points to comments made by the court which CNA contends show that the court was highly skeptical of the merits of plaintiffs' bad faith claim as evidence that it was entitled

to judgment prior to submission of the case to the jury.⁹ CNA argues that because the jury concluded that there was no bad faith by CNA, it must have compensated by finding that CNA breached the insurance contract, thereby resulting in a compromise verdict.

The court finds CNA's arguments to be without merit. First, Rule 50 approves of precisely the practice implemented by the court in this case. As the committee note explains:

Often it appears to the court ... that a motion for judgment as a matter of law made at the close of the evidence should be reserved for a post-verdict decision. This is so because a jury verdict for the moving party moots the issue and because a preverdict ruling gambles that a reversal may result in a new trial that might have been avoided.

See Fed. R. Civ. P. 50, committee note. CNA points to nothing to support the contention that the court abused the discretion provided to it under the Rule in allowing the jury to decide the bad faith claim in the first instance.

Second, CNA points to no evidence even remotely suggesting that the jury did, in fact, compromise its verdict. See Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 54 (3d Cir. 1989) (rejecting defendant's contention of compromise

9. In its brief, CNA points to two particular comments. First, when CNA moved for judgment as a matter of law on plaintiffs' bad faith claim after plaintiffs had rested, the court stated, "Okay. That I don't recall much evidence on that." See Tr. 1/18/00 at 141. Second, the court stated that it would take CNA's renewed Rule 50 motion under advisement, submit the case to the jury, subject to the court's later ruling on the motion. See Tr. 1/20/00 at 126.

verdict stating that, on review, court "must ascertain only whether the jury's verdict is reasonable in light of the evidence presented, and not to indulge in unsubstantiated and speculative assertions"), overruling recognized on other grounds, Starceski v. Westinghouse Electric Corp., 54 F.3d 1089, 1099 n.10 (3d Cir. 1995). That the jury found for plaintiffs on the breach of contract claim but rejected the bad faith claim does not now license the court to speculate that, had the court submitted only the breach of contract claim to the jury, the jury would have found for CNA on that claim. Therefore, CNA's argument asserting a compromise verdict is rejected.

II. MOTION FOR NEW TRIAL

A. Legal Standard

A trial court may grant a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). In evaluating a motion for a new trial on the basis of trial error, a district court must first determine whether an error was made in the course of the trial and then decide "whether that error was so prejudicial that refusal to grant a new trial would be 'inconsistent with substantial justice.'" Bhaya v. Westinghouse Elec. Corp., 709 F. Supp. 600, 601 (E.D.

Pa. 1989), aff'd, 922 F.2d 184 (3d Cir. 1990). A court's discretion is more limited when a motion for a new trial alleges that the jury's verdict is against the weight of the evidence. See Klein, 992 F.2d at 1290. Indeed, the Third Circuit has cautioned that the district court should grant a new trial on this basis "only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience." Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991). This more stringent standard is necessary to ensure that a district court does not substitute its "judgment of the facts and the credibility of the witnesses for that of the jury." Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992). In considering a new trial motion, the district court must "view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict." Marino v. Ballestas, 749 F.2d 162, 167 (3d Cir. 1984). To uphold the verdict, the district court need only determine that the record contains the minimum quantum of evidence from which a jury might reasonably afford relief. See Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980).

B. The Dismissal of the Juror¹⁰

CNA claims that it is entitled to a new trial because one of the eight jurors selected for trial was dismissed by the court after the closing of the evidence but before closing statements and the start of deliberations. CNA apparently contends that rather than dismiss the juror, the court should have either waited longer or should have made further efforts to ascertain the missing juror's whereabouts. CNA also argues that the court's action in dismissing the juror caused it severe prejudice although CNA has not identified in what manner it was so prejudiced.

Rule 47 of the Federal Rules of Civil Procedure provides that a trial judge "may for good cause excuse a juror from service during trial or deliberation." See Fed. R. Civ. P. 47(c). Based upon the circumstances before it, the court finds good cause existed to dismiss the absentee juror.

On the day counsel were scheduled to give their closing arguments, one of the eight jurors failed to appear on time. After waiting for thirty-five minutes, the court discussed with counsel two alternatives: (1) wait for the juror to appear but

10. As an alternative to judgment as a matter of law on the breach of contract and bad faith issues discussed above, CNA seeks a new trial. For the reasons set forth above in Section I. A-D, the court concludes that a new trial based on those grounds is likewise not required, finding no miscarriage of justice by allowing the verdict to stand.

reduce the sixty minutes each side had been allotted for closing, pro tanto, by the time that the juror was late; or (2) dismiss the late-arriving juror and proceed with seven jurors.

Although the court originally decided to implement the first option, a pro-tanto reduction in the time for closing statements, see Tr. 1/21/00 at 11, it soon concluded, while waiting for the absentee juror to arrive, that reducing the allotted time below fifty minutes per side (even after only a four-day trial) could impair counsel's ability to deliver a structured closing. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609-11 (3d Cir. 1995) (discussing court's inherent power to set necessary time limits after making an informed analysis of circumstances). Instead, the court decided that waiting for the absentee juror any longer on that day was not consistent with the sound administration of justice. The court's decision was based on the following calculus: One, the missing juror hailed from Lancaster, a two-hour train ride to Philadelphia. Id. at 13. Moreover, the juror had not called in, and the efforts by the court's staff to ascertain his whereabouts were unsuccessful. Given the inclement weather and the distance the juror had to travel to reach the courthouse, the court could not even estimate how much to delay the trial perchance the missing juror would belatedly appear. Two, a longer delay that morning would have made it unlikely that closing statements, the

jury charge, and the deliberations could be completed in one day, thus making a return the following week a near certainty. Since the jurors would have to come back the next week, making the jurors continue to sit idly without the certainty of a starting time would further tax the already-taxed patience of the jurors. This was a matter of concern because due to a combination of factors, including defense counsel's temporary disability (loss of her voice), the resulting unavailability of a key witness for plaintiffs, and lengthier testimony than anticipated, the jury's time of service, which the court had advised would last approximately four days, was now to be extended into a fourth week. Finally, counsel, inter alia, had attempted to come up with a compromise but had failed to proffer a joint alternative. Id.

Having decided against waiting any longer for the juror on that day, the court then presented counsel with the following two choices: (1) given that it was Friday, return the following Monday to continue the trial with hopefully all eight jurors; or (2) dismiss the late juror and proceed with seven jurors on that day.¹¹ Neither counsel desired to return the following Monday, and thus, both counsel agreed to proceed. See Tr. 1/21/00 at 14

11. Thus, to the extent CNA now argues that "[a]t the very least, the trial court should have explored the option of continuing the case ...[,]" see Pl.'s Mem. of Law at 25, such argument is disingenuous given that CNA's own counsel rejected that very option when presented with it by the court.

(Plaintiffs' counsel: "Go along without him, absolutely;" CNA's counsel: "We'll proceed."). Under these circumstances, the court did not abuse its discretion in dismissing one of eight jurors prior to the beginning of closing arguments and deliberations.

C. Damages

CNA further claims that a new trial is warranted on the issue of damages. CNA contends that it was error for the court, upon the jury's finding that CNA had breached the contract and over defense counsel's objection and request for a separate hearing to establish plaintiffs' damages, to enter judgment for plaintiffs in an amount equal to the estimate prepared by the plaintiffs' adjustor. CNA claims that the estimate prepared by the adjustor was obviously biased and was excessive given that plaintiffs purchased the entire building for \$437,000 three years earlier.

At trial, only plaintiffs presented evidence on the amount of damages. Specifically, plaintiffs offered the testimony of Mr. Stafford, who, based upon his seven-year's experience as a public adjustor, estimated that the damage to plaintiffs' building equaled \$339,902.04. See Tr. 1/18/00 at 11-13; Pls.' Ex. P-9. Mr. Stafford supported his testimony with a written estimate that he had prepared based on his inspection of

the roof shortly after the storm. See Tr. 1/6/00 at 179; Tr. 1/18/00 at 29. Mr. Stafford testified that, using a computerized estimating system - the Homony 4000 system, he prepared the estimate based on the measurements of the building and the "field notes" he took during his inspections of the property. See Tr. 1/18/00 at 11-12, 29. Although CNA sought to discredit that estimate on cross-examination, see id. at 20-21, 29, CNA consciously chose, "as a matter of sound trial strategy," not to present any evidence on the cost of repairs, believing such evidence would "severely undermine[] its defense. See Def.'s Mem. of Law in Support of its Mot. at 26 n.8 (stating that "CNA did not acquiesce to th[e] estimate prepared by Mr. Stafford" but conceding that "[a]t trial, CNA did not present evidence to rebut this dollar figure ..."). In fact, the only comment regarding the amount of damages by any of CNA's witnesses was a statement by CNA's own claim adjuster who commented that Mr. Stafford's estimate "appear[ed] to be on the high side." See Tr. 1/20/00 at 63.

After meeting with counsel and based upon the evidence presented, the court crafted its proposed jury instructions and verdict form, which it provided to counsel. Specifically, the court provided the following instruction on damages:

"Now, if the plaintiff[s] show[] by a preponderance of the evidence that the damage was caused by the rain and wind storm, the Court will enter judgment for the plaintiff[s] in the amount of the claim. Therefore,

you need not determine any specific amounts of damages for the plaintiffs' breach of contract claim, you must only determine liability and not damages.

Tr. 1/21/00 at 95. The court provided counsel with two opportunities to comment on the proposed instructions before the court charged the jury. See Tr. 1/20/00 at 142; Tr. 1/21/00 at 3-9, 11-12. Shortly before closing arguments began, the court asked counsel for CNA, "[D]o you have any problems at all with [the] instructions?" Counsel responded, "Oh no, Judge, I'm fine." See Tr. 1/21/00 at 12. Immediately following the court's charge, the court, at sidebar, asked, "For the defendant, are there any objections or exceptions that you wish to take to the charge?" Counsel responded, "No, Your Honor." Id. at 103.¹²

In addition, based upon the evidence presented by the parties, the court's proposed verdict form did not contain a line for the jury to set a dollar amount in damages. CNA did not object to the verdict form either.

Finally, as to CNA's request for a separate hearing on damages, not once prior to trial or before the jury announced its verdict did CNA request a bifurcated trial on damages. See Fed. R. Civ. P. 42(b) ("The court ... may order a separate trial of any claim ... or of any separate issue ..."). Simply because

12. The Federal Rules of Civil Procedure state that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict." See Fed. R. Civ. P. 51.

CNA's roll of the dice at trial in choosing to forego the opportunity to present evidence on damages came up snake-eyes does not entitle CNA to a separate trial on damages now. Rather, CNA must face the consequences of such a peril-laden strategy. See, e.g., Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 860 (Tex. App. 1987) (finding jury's verdict of \$7.53 billion dollars sufficiently supported by evidence and noting defendant's choice not to present testimony on damages).

The court finds that the amount of damages awarded is adequately supported by the only evidence presented by any of the parties regarding the amount of damages suffered. Thus, CNA's instant motion will be denied.

III. REMITTITUR OF VERDICT

A. Legal Standard

With regard to remittitur, such relief is appropriate if the court "finds that a decision of the jury is clearly unsupported and/or excessive." Spence v. Board of Educ. of Christina Sch. Dist., 806 F.2d 1198, 1201 (3d Cir. 1986); see 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2815 (1973). If remittitur is granted, the party against whom it is entered can accept it or can proceed to a new trial on the issue of damages.

B. Discussion

CNA seeks a remittitur of the damages award. CNA bases this request on the fact that the estimate to fix the roof was \$339,982.04 while the entire building, just three years earlier, cost plaintiffs only \$437,000.

The court declines to accept CNA's invitation to order a remittitur. The amount awarded in damages to plaintiff fairly reflects the evidence presented as to the loss suffered by plaintiffs as a result of CNA's breach of the insurance contract. As discussed above, the amount of the claim, as prepared by Mr. Stafford, was the only evidence presented by either party at trial regarding damages. That the amount of the claim was slightly less than the amount for which plaintiffs purchased the building three years prior is irrelevant. Indeed, CNA does not point to any provision in the contract that limits the amount of any damages for a breach of the contract to the purchase price of the insured property. Nor could the court imply such a restriction because to do so would be to construe the contract in favor of the drafter, CNA -- an action that would violate one of the axiomatic tenets of contract law. Accordingly, the court finds that the award is not "so large as to shock the conscience of the court." Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983).

IV. CONCLUSION

For the reasons set forth above, the court will deny defendant's motion for judgment as a matter of law or, in the alternative, for a new trial or remittitur.

An appropriate Order follows.

