COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1207 **Cir. Ct. No. 2006CV199**

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

THOMAS L. OLSON,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ZURICH AMERICAN INSURANCE COMPANY AND IBARRAS-MCCLARY GLOBAL LLC D/B/A COULEE COUNTRY TITLE,

DEFENDANTS,

COLUMBIA CASUALTY COMPANY, DAVID J. REED D/B/A UNITED COUNTRY OAKWOOD REALTY, LLC, STEWART TITLE GUARANTY COMPANY,

DEFENDANTS-RESPONDENTS,

COMMONWEALTH LAND TITLE INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 SHERMAN, J. Thomas L. Olson appeals from three separate judgments of the circuit court after a jury trial in the above matter: a judgment in Olson's favor against Commonwealth Land Title Insurance Company in the amount of $26,383.28, along with judgments of dismissal against David J. Reed and Stewart Title Guaranty Company. Commonwealth cross-appeals from the judgment entered against it.

BACKGROUND

¶2 This case arises from the closing of a real estate transaction from which Olson was to receive $175,968.19 in cash net proceeds. Reed, Olson's realtor for the transaction, recommended that Coulee Country Title, the local office of the title company, Ibarras-McClary Global LLC (I-M), prepare the necessary title work and serve as the closing agent for the sale. Pamela K. Harris, an I-M employee at the time, was the closing agent who handled the transaction. She also managed the trust account at Coulee County Title into which the net proceeds of the sale were deposited. At the time of the transaction at issue here, Commonwealth was the title insurance company for whom I-M served as an underwriting agent. Prior to serving as Commonwealth's underwriting agent, I-M served as the underwriting agent for Stewart Title. Olson alleged that Stewart Title terminated its relationship with I-M in November 2005 due to irregularities in I-M's trust account and problems with the nonpayment of premiums; however, in discussions with Commonwealth, Stewart Title indicated that I-M was a "good

agent" and that I-M's agency with it was terminated because there was another agent in the area.

¶3 The closing took place on May 22, 2006. The following day, Harris delivered to Olson a check issued by I-M and signed by Harris in the correct amount. When Olson deposited the check into his bank, it did not clear and was returned because the I-M trust account did not have sufficient funds to cover the check.

¶4 After some unsuccessful attempts to receive the sale proceeds from I-M, Olson brought the present action against Reed, I-M, Commonwealth, Stewart Title, and their individual insurers, to recover the proceeds of the sale to which he was entitled.[1] Olson alleged that I-M was negligent in its hiring, training and supervision of Harris, and that Stewart Title colluded with I-M and Harris to conceal the reason why Stewart Title terminated its agency with I-M and to assist I-M in obtaining a new underwriter. Olson alleged that Reed was negligent in recommending I-M and that Harris was both negligent and had committed theft or misappropriation. Several defendants cross-claimed against other defendants; however, only the cross-claims of Commonwealth against Stewart Title for intentional misrepresentation and negligent misrepresentation were tried to verdict.

¶5 At the completion of the trial, the jury was given twenty-seven special verdict questions to answer, including a five-part question on allocation of comparative negligence. The jury found Stewart Title to be causally negligent and

[1] Olson also brought suit against Harris; however, prior to trial she was discharged in bankruptcy and dismissed from the lawsuit.

allocated 14% of the damages to it. On Commonwealth's cross-claims against Stewart Title, the jury found that Stewart Title was not guilty of intentional misrepresentation. As to Commonwealth's negligent misrepresentation claim, the jury found that Stewart Title made a misstatement of fact to Commonwealth upon which Commonwealth relied, but that Commonwealth was causally negligent in so relying. The jury apportioned the negligence between them as 43% Stewart Title and 57% Commonwealth. Thus, the jury rejected the notion of fraudulent misrepresentation, and found Commonwealth's contributory negligence to outweigh Stewart Title's negligent misrepresentation as a cause of its damages.

¶6 The parties filed a number of motions after verdict, including some for judgment upon the verdict and several for judgment notwithstanding the verdict, upon all of which the circuit court held a hearing. After the hearing, the circuit court issued orders, which became the basis of the four judgments that are the subject of this appeal. In summary:

1. The circuit court entered judgment in favor of Olson against I-M in the amount of $113,458.11, plus taxable costs. The amount of this judgment included the damages that the jury awarded to Olson against I-M, together with those allocated to Harris, its employee, along with statutory interest. No issue has been raised in this appeal, or the cross-appeal, regarding this judgment.

2. The circuit court also entered judgment in favor of Olson against Commonwealth in the amount of $26,383.28, plus costs. This amount includes statutory interest, as well.

3. The circuit court entered judgment of dismissal in favor of Stewart Title and against Olson, on Stewart Title's motion for judgment

notwithstanding the verdict on the basis of public policy. Costs were taxed against Olson in the amount of $5,677.22.

4. Finally, the circuit court entered judgment of dismissal in favor of Reed and his insurance carrier against Olson, together with costs. This judgment was based upon the jury's unanimous verdict that Reed was not negligent.

¶7 In addition, the circuit court denied Olson's motions for judgment in the full amount of $134,314.19[2] against I-M, along with his motions to change verdicts for a new trial and for other relief.

¶8 Olson appeals and Commonwealth cross-appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶9 Olson raises twelve separate issues on appeal and Commonwealth's cross-claim raises one. We will address the various claims in separate sections of the discussion.

A. Claim Dismissal on Public Policy Grounds

¶10 On postverdict motions, the circuit court determined that, despite the jury's finding of causal negligence, liability should not be imposed on Stewart Title on public policy grounds. It reached the opposite conclusion, however, with

[2] Although the NSF check was in the amount of $175,968.89, there were some funds remaining in the I-M trust account which were later disbursed by order of the circuit court to Olson. The "full amount" is the difference remaining after the distribution.

respect to Commonwealth, concluding that public policy did not preclude the imposition of liability with respect to Commonwealth's causal negligence. Olson challenges the circuit court's public policy determination with respect to Stewart Title and Commonwealth, in its cross-appeal, challenges the circuit court's public policy determination with respect to itself. We begin with a review of basic principles.

¶11 To establish a claim for negligence in Wisconsin, a plaintiff must show the existence of four basic elements: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between that breach and the harm alleged; and (4) actual loss or damage as a result of the harm. ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 260, 580 N.W.2d 233 (1998). Even if a plaintiff is able to show the existence of each of these four elements, the imposition of liability on the defendant may nevertheless be precluded on the basis of public policy. ***Id.*** Whether public policy precludes the imposition of liability for negligence presents a question of law subject to our independent review. ***Id.*** at 264.

¶12 Our supreme court has set forth six nonexclusive policy reasons for not imposing liability for negligence. They are:

> (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Id. at 265**.** In rendering its decision in the present case on Stewart Title's motion for judgment notwithstanding verdict (JNOV), the court stated that "factors one, three and six in particular, in my opinion, would weigh in favor of Stewart [Title] not being properly part of this lawsuit."

1. Stewart Title

¶13 Olson's argument with respect to the dismissal of Stewart Title on public policy grounds is not fully developed. Olson mixes arguments regarding the elements of negligence[3] with an argument directed at the public policy considerations upon which the circuit court based its decision. Olson's sole argument related to the public policy considerations is a bald assertion that foreseeability is a question of fact for the jury, but there is no citation to any legal authority for this assertion. We deem this to be an undeveloped argument and reject it on that basis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶14 Moreover, Olson does not dispute arguments made by Stewart Title in its response, which analyzes all six of the public policy factors set forth in paragraph nine above, along with case law interpreting the factors. In its reply, Olson again fails to differentiate between a discussion of the elements of negligence and an argument directed at public policy limits to negligence, devoting only one sentence to foreseeability, again unsupported by citation to legal authority, and briefly addressing only one of Stewart Title's public policy

[3] As we explain in the following section on Commonwealth's cross-appeal, a challenge to the elements of negligence is not germane to the issue of limiting liability on public policy grounds. As we explain there, the jury has decided negligence and neither Olson nor Stewart has challenged the sufficiency of the verdict.

arguments. The main thrust of Stewart Title's argument is undisputed and we consider it conceded by Olson. *See* ***Schlieper v. DNR,*** 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted).

¶15 We therefore affirm the decision of the circuit court granting Stewart Title's JNOV motion in Stewart Title's favor in light of Olson's failure to develop an argument on this issue on appeal and his failure to reply to the fully developed responsive argument of Stewart Title.

2. Commonwealth's Cross-Appeal

¶16 Commonwealth contends that the circuit court erred in not granting its repeated motions that imposing liability on Commonwealth contravenes public policy. Commonwealth argues that I-M and Harris were not its employees, and that their relationship as agents was limited to the sale of title insurance and did not include handling closings. Olson responds that the claim against Commonwealth is one for negligent hiring, training and supervision, which is established in Wisconsin for agents as well as employees.

¶17 Commonwealth was found to be causally negligent for Olson's injuries by the jury. Commonwealth does not challenge jury instructions on negligence and does not challenge the sufficiency of the evidence supporting the jury's negligence finding with respect to Commonwealth. Therefore, causal negligence is not an issue. The issue, therefore, is whether Wisconsin law imposes upon Commonwealth liability for that negligence or if that liability is precluded by public policy considerations. The distinction is important because much of

Commonwealth's argument seems focused on whether it had a duty toward Olson, an issue which was resolved by the jury's verdict.[4]

¶18 Commonwealth argues that it lacks privity with Olson, that its contract with I-M is limited to underwriting title insurance, and that Harris was not its employee. However, Commonwealth is essentially arguing that it has no duty toward Olson, but that issue is not before us. The jury found negligence, which presupposes that there is a duty, and Commonwealth has chosen not to appeal any aspect of the jury's verdict. *See* ***A. E. Inv. Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 484, 214 N.W.2d 764 (1974). Likewise, when Commonwealth argues that it was not negligent in its investigation of I-M prior to engaging them as an agent, it is arguing about issues resolved in both the jury's verdict in Olson's claim against them and the separate verdict in its own counterclaim against Stewart Title that its contributory negligence was greater than Stewart Title's negligence, neither of which was raised as an issue in this appeal.

¶19 Looking to the six public policy factors for not imposing negligence liability, it is difficult to discern a public policy reason to limit Commonwealth's liability. *See* ***Miller***, 219 Wis. 2d at 264-65. First, the injury is not remote from the negligence, whether one considers the negligence of I-M and Harris or the negligent investigation of I-M by Commonwealth. The injury is precisely what would be expected from mismanagement of a trust account. Second, the injury is not out of proportion to the culpability of the tortfeasor, since it is exactly the kind of injury that could have been foreseen. Third, it does not seem highly

[4] "[O]nce an act has been found to be negligent, we no longer look to see if there was a duty to the one who was in fact injured." ***A. E. Inv. Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 484, 214 N.W.2d 764 (1974) (citation omitted).

extraordinary that mismanagement of a trust account would lead to insufficient funds in the account, or that failure to investigate a person in a position of trust involving money could lead to the sort of financial consequences that occurred in this case.

¶20 The final three factors likewise militate in favor of Commonwealth's liability. It would not place an unreasonable burden on Commonwealth to expect it to investigate the financial dealings of a party that Commonwealth allowed to present itself to the public as Commonwealth's agent. Nor can one foresee how allowing liability in this case could lead to fraudulent claims. Here we have a claim that exists because there were insufficient funds in I-M's trust account and the insufficiency was revealed by a neutral third party, the bank. Finally, despite Commonwealth's argument to the contrary, there is no apparent slippery slope. Commonwealth is being asked no more than to exercise the same standard of care that our courts have imposed on others in the past. *See, e.g.,* ***A. E. Inv. Corp***., 62 Wis. 2d 479.

¶21 While it is not clear how this relates to the public policy discussion, Commonwealth also invokes the economic loss doctrine as a bar to Olson's claim. However, the economic loss doctrine has no application to this situation. The very case cited by Commonwealth clearly states: "The economic loss doctrine is a judicially created doctrine providing that a commercial purchaser of a product cannot recover from a manufacturer, under the tort theories of negligence or strict products liability, damages that are solely 'economic' in nature." ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998). Commonwealth goes to pains to point out that, with respect to Commonwealth, Olson is not a purchaser at all.

¶22 Although it is again unclear how it relates to the issues at hand, Commonwealth also argues that there is no vicarious liability because of the lack of a master-servant relationship. However, Olson does not claim vicarious liability. Likewise, Commonwealth claims that under Wisconsin law "[a] principal is not liable for failure to supervise an independent contractor unless the principal has a right to supervise the contractor's internal operations," citing ***Milwaukee Area Technical College v. Frontier Adjusters of Milwaukee***, 2008 WI App 76, ¶23, 312 Wis. 2d 360, 752 N.W.2d 396. However, Commonwealth's agency agreement with I-M does give it supervisory authority, including the authority to audit I-M's trust account.

¶23 Therefore, we hold that Commonwealth has not shown that public policy precludes the imposition upon it of liability for the negligent conduct that the jury found.

B. Inconsistent Jury Verdict

¶24 Following the jury's verdict, Olson moved the circuit court for a new trial on the ground that "[t]he verdict does not comply with [WIS. STAT.] § 805.09(2) [2009-10] … in that the same 5/6ths of the jurors did not agree upon all questions with respect to the same claims." The circuit court denied the motion.

¶25 Olson contends that agreement of five-sixths of the jurors is lacking as to two claims: his claim against Stewart Title and his claim against

Commonwealth.[5] In both cases, there are an adequate number of jurors agreeing to all the questions regarding negligence, but different jurors dissenting on the question of comparative negligence, potentially leaving the issue with an insufficient number of jurors to constitute five-sixths on all the questions.

¶26 Stewart Title responds that the apportionment question is not part of Olson's claim against Stewart Title and that there is a consistent five-sixths verdict on all questions necessary to establish causal negligence. Commonwealth simply argues, with regard to the verdict in Olson's case against it, that there is five-sixths agreement. In reply, Olson analyzes the verdicts in the two claims question by question, but again asserts that the comparative negligence question must be included in the analysis of both issues. As we explain below, we agree with Stewart Title and Commonwealth.

¶27 Article I, Section 5 of the Wisconsin Constitution authorizes the legislature to provide by legislation for five-sixths jury verdicts in civil cases. Under this authority, the legislature enacted WIS. STAT. § 805.09(2) (2009-10), which provides:

> VERDICT. A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict *on the same claim*, the same five-sixths of the jurors must agree on all the questions. (Emphasis added.)

Section 805.09(2) does not require that the same five-sixths of the jury agree to every question; rather, the verdicts must be reviewed on a claim-by-claim basis,

[5] There is a lack of five-sixths as to the counterclaim of Commonwealth against Stewart Title for negligent representation. We do not reach this issue because it is not raised by Olson, Commonwealth or Stewart Title.

with the same five-sixths agreeing to all questions necessary to arrive at a judgment on each particular claim. ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983). As a result, "dissents important to one claim may be immaterial to another when the verdict is reviewed." ***Id.***

¶28 Determination of whether five-sixths of the jurors answered all of the necessary questions as to each claim requires reviewing the special verdict questions in each of the two claims.

¶29 In Olson's claim against Stewart Title, question 23 asked: "Was Stewart Title negligent in comments made to Commonwealth?" and question 24 asked: "Was Stewart Title's negligence a cause of injury to Plaintiff?" The jury answered "yes" to both questions, with Juror Liss dissenting to both. Damages were stipulated to. On comparative negligence, a separate section of the verdict form, question 25 asked the jury to allocate the percentage of negligence attributed to each party. Question 25E was the line item for Stewart Title. The jury allocated 14% of the negligence to Stewart Title, with jurors Rodriguez and Armoto dissenting. Clearly, if the comparative negligence is a necessary question in resolving Olson's claim against Stewart Title, there are not five-sixths of the jurors who agree to all the questions, even though there are five-sixths who agree on the negligence questions and a different five-sixths who agree on the comparative negligence.

¶30 In Olson's claim against Commonwealth, there is no such problem. In special verdict question 7, the jury unanimously found Commonwealth to be negligent. In question 8, the jury was asked: "Was such conduct of Commonwealth a cause of the conduct of Pamela Harris?" The jury answered "yes," with juror Weisse dissenting. On comparative negligence, in question 25D,

the jury allocated 16% of the total negligence to Commonwealth, with juror Rodriguez dissenting. With respect to Commonwealth, it doesn't matter whether we resolve whether comparative negligence is a part of the claim or not. Only two jurors dissented altogether, thus five-sixths agree.

¶31 Accordingly, the matter comes down only to Olson's claim against Stewart Title. Because we affirmed the circuit court's JNOV on this claim, the verdict is of no consequence and we will not address this issue further.[6] *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

C. Inclusion of Harris in Negligence Comparison

¶32 Olson contends that the circuit court erred in including Harris in the special verdict form in the questions relating to comparative negligence. In question 25 of the special verdict, the jury was asked to apportion negligence among the defendants. Included among the defendants was Harris, who had been dismissed due to discharge in bankruptcy. The jury found Harris to be 40% negligent and I-M to be 30% negligent. The jury was also asked in question 27: "Did Pamela Harris intentionally issue a worthless check to the plaintiff, Thomas Olson, on May 22, 2006?" The jury answered "yes" to that question.

[6] We do take note, however, that the Wisconsin Supreme Court decided in ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 403, 331 N.W.2d 585 (1983), that the comparative negligence question was not part of the plaintiff's claim where, as here, the plaintiff has no potential negligence.

¶33 Olson argues that Harris should not have been included in the special verdict form questions on the issue of comparative negligence because the jury found her action of issuing the check to be intentional. Olson's argument is based on his interpretation of the evidence as showing that Olson's harm resulted exclusively from the intentional act of issuing the check. Stewart Title argues in response that Harris's negligent conduct prior to May 22, 2006, in not properly maintaining the trust account created the trust account imbalance, providing a basis for the jury to find her negligent, which the jury did. Olson's reply to this argument is essentially a restatement of his argument in his initial brief.

¶34 Stewart Title also argues that the issue is moot because the circuit court in its judgment combined the liability of Harris together with the liability of her employer, I-M. Olson does not respond to this argument.

¶35 Because Olson has not disputed Stewart Title's arguments, those arguments are taken as admitted and we therefore do not further address this issue. *See* ***Schlieper,*** 188 Wis. 2d at 322 (a proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted.)

D. Jury Instruction on Reed's Duty

¶36 Olson contends that the circuit court erred in instructing the jury on Reed's duty of care when making a referral. Olson's argument is composed only of conclusory statements that are unsupported by legal authority. We need not address arguments composed of conclusory statements unsupported by authority and will not here. *See* ***Pettit***, 171 Wis. 2d at 646.

E. Olson's Remaining Issues

¶37 To the extent that Olson has raised other issues which we have not addressed in our opinion, we conclude those issues to be either inadequately developed or lacking in sufficient merit to warrant individual attention. ***Id***.

CONCLUSION

¶38 For the reasons discussed above, we affirm the circuit court.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.