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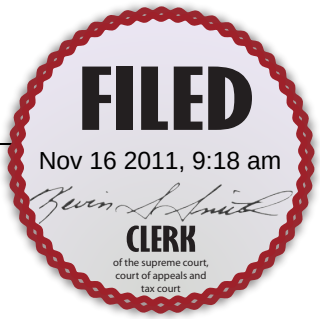

IN THE COURT OF APPEALS OF INDIANA

ROY M. STRONG, and INDEPENDENT ASSOCIATES, INC.,	)	
Appellants,	)	
vs.	)	No. 49A02-1010-PL-1167
BERTHA M. McKINSTER, individually and as attorney in fact for ROBERT W. McKINSTER, and as Trustee of the Bertha McKinster Trust and as Trustee of the Robert McKinster Trust,	)	
Appellees.	)	

APPEAL FROM THE MARION SUPERIOR COURT 13
The Honorable Timothy W. Oakes, Judge
Cause No. 49D13-0803-PL-10480

November 16, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Bertha McKinster, individually and as attorney in fact for Robert McKinster, and as Trustee of the Bertha McKinster Trust and the Robert McKinster Trust (collectively "McKinster") sued Roy Strong and Independent Associates (collectively "Strong") in Marion Superior Court alleging conversion, securities fraud, racketeering, breach of fiduciary duty, constructive fraud, and negligence. A jury trial was held, and the jury found in McKinster's favor and awarded her $643,200 in damages. Strong appeals the verdict and argues that the jury was improperly instructed and that the evidence is insufficient to support the jury's verdict.

Concluding that Strong's arguments are waived and not available on appeal, we affirm.

Facts and Procedural History

When McKinster's husband was placed in a nursing home, she sought Strong's assistance to help her with financial planning due to her husband's incapacity. Strong had known McKinster for several years and had assisted McKinster and her husband in establishing their trusts and brokerage accounts. In June 2007, Strong arranged for McKinster to meet with Claire Lewis ("Lewis"), an attorney with expertise in Medicaid and estate planning. During the meeting, which Strong also attended, Lewis explained the Medicaid process and the options available to protect McKinster's assets and resources, which included investing in real estate and/or annuities. Lewis advised McKinster to liquidate her accounts and then they would decide how best to invest those funds to protect McKinster's assets. Strong agreed to liquidate McKinster's accounts

and to provide to Lewis the financial information required to proceed with McKinster's Medicaid application.

On June 25, 2007, McKinster purchased real estate from Carl Archer. McKinster paid $84,000 for a residence on Talbott Street and $68,000 for a residence on Lambert Street. Four days later, McKinster purchased two additional parcels of real estate on South Keystone and Boulevard Place, paying $50,400 and $52,000 respectively. The South Keystone property was purchased from Bryan Archer. The Boulevard Place property was purchased from BSN Properties, LLC by John Sherby, Member. Lewis was not advised of these transactions. The real estate sales were facilitated by Pat DeBruler ("DeBruler") and Strong.

Strong introduced McKinster to DeBruler, who was a mortgage broker. DeBruler located the real estate that McKinster purchased, and DeBruler claimed that the parcels purchased were rental properties. Strong was present when McKinster viewed two of the properties, and Strong was present at the real estate closings, which were held in his office. Strong falsely told McKinster that he had discussed the real estate purchases with Lewis and that Lewis stated that purchasing the properties was what McKinster needed to do. Tr. p. 255.

Strong also induced McKinster to purchase the four parcels of real estate by telling her that they were being renovated, which would increase their value when the renovations were complete. Strong told her that the properties could be sold for a profit approximately three months after the closings.

But Strong failed to disclose to McKinster that DeBruler was a tenant in his office building. Further, DeBruler owed Strong thousands of dollars in back rent. After Lewis discovered that McKinster had liquidated her accounts and used the funds to purchase real estate, she investigated the matter further and learned that Strong and DeBruler received commissions that were not disclosed on the HUD statements as required by law. The HUD statements disclosed only minimal processing fees to DeBruler. Specifically, Strong received nearly $10,000 total from sellers either directly or via DeBruler, which DeBruler owed him for back rent.

In total, McKinster purchased the four parcels of real estate for $254,400. The four properties later sold for a total of $40,000. Lewis, who viewed the properties after McKinster purchased them, described them as "absolutely horrifying" and as "slum properties." Tr. p. 227.

On March 6, 2008, McKinster filed a complaint against Strong in Marion Superior Court, and her complaint was amended in 2009. A three-day jury trial commenced on September 14, 2010, and Strong represented himself at trial. After the evidence and arguments were presented, the jury was instructed that if McKinster proved racketeering or conversion they should award treble damages. Tr. p. 670. The jury rendered a general verdict in McKinster's favor and awarded her $643,200[1] plus reasonable attorney fees

[1] The difference between the amount McKinster paid for the properties and what they were sold for is $214,400. The jury clearly used that figure to arrive at the treble damage amount of $643,200,

and costs. The trial court entered a final judgment on the jury's verdict on September 30, 2010.[2] Strong now appeals. Additional facts will be provided as necessary.

I. The Jury Instructions

Strong argues that there were several errors or omissions in the trial court's jury instructions. Strong claims the instructions were deficient in that certain terms central to McKinster's theories of liability were not defined, such as "racketeering activity," "securities," and the scope of a financial planner's duty to his clients. Ultimately, Strong argues that the jury likely "determined liability applying technical legal standards not made known to it in the instructions," and therefore, the verdict should be overturned. Appellant's Br. at 20.

But Strong failed to tender any instructions defining such terminology to the trial court and failed to object to the instructions given. He has therefore waived these arguments on appeal. See Jamrosz v. Res. Benefits, Inc., 839 N.E.2d 746, 761 (Ind. Ct. App. 2005), trans. denied (citing Estate of Hunt v. Bd. of Comm'rs of Henry Cnty., 526 N.E.2d 1230, 1236 n.5 (Ind. Ct. App. 1988), trans. denied); Trial Rule 51(C)); see also Baker v. State, 948 N.E.2d 1169, 1178 (Ind. 2011) (stating that failure to tender an instruction results in waiver of the issue on appeal)). Moreover, Strong has not supported his argument by adequate citation to authority, which also results in waiver of the issues raised. See Appellate Rule 46(A)(8)(a); Romine v. Gagle, 782 N.E.2d 369, 386 (Ind. Ct.

[2] Strong's notice of appeal was filed within thirty days of the trial court's entry of final judgment pursuant to Trial Rule 58. We therefore reject McKinster's argument that Strong's appeal was not timely filed.

App. 2003), trans. denied. For these reasons, we will not address Strong's claims of instructional error.

II. Sufficient Evidence to Support the Verdict

Strong also argues that the evidence was insufficient to support the verdict, and specifically, that the evidence was insufficient to prove each theory of liability pled in McKinster's complaint. The jury rendered a general verdict in McKinster's favor. See Jamrosz, 839 N.E2d at 761 (stating that a general verdict will be sustained if the evidence is sufficient to sustain any theory of liability). But because the jury awarded treble damages, we presume the jury concluded that McKinster proved either conversion or racketeering or both. In her appellee's brief, McKinster responds only to Strong's argument with regard to conversion.[3]

Although not addressed in McKinster's Appellee's brief, we observe that Strong failed to raise the issue of insufficient evidence to support the jury's verdict in either a motion for judgment on the evidence or a motion to correct error. In a civil proceeding, a claim of insufficient evidence may not be raised for the first time on appeal. Henri v. Curto, 908 N.E.2d 196, 208 (Ind. 2009). "Procedural default" or "forfeiture" of an issue "is a doctrine of judicial administration whereby appellate courts may sua sponte find an issue foreclosed under a variety of circumstances in which a party has failed to take the necessary steps to preserve the issue." Strong v. State, 820 N.E.2d 688, 690 n.1 (Ind. Ct. App. 2005) (citing Bunch v. State, 778 N.E.2d 1285, 1287 (Ind. 2002)), trans. denied.

[3] We observe that Strong did not argue any deficiency in the trial court's jury instructions concerning conversion.

In Henri, our supreme court discussed the interplay between Trial Rules 50(A) (motion for judgment on the evidence) and 59(A) (motion to correct error), and concluded that a claim of insufficient evidence may not be initially raised on appeal in civil cases if not previously preserved in the trial court by either a motion for judgment on the evidence filed before judgment or in a motion to correct error. Because Henri sought to challenge the sufficiency of the evidence supporting the jury's verdict for Curto on his counterclaim, but failed to present the issue in either a Rule 50 motion for judgment on the evidence or post-trial Rule 59 motion to correct error, the court concluded the issue was procedurally defaulted. 908 N.E.2d at 208. See also Thompson v. Gerowitz, 944 N.E.2d 1, 7 (Ind. Ct. App. 2011) (concluding that the appellant's argument that the evidence was insufficient to establish the cause in fact element of an informed consent claim was not available for appellate review because the appellant did not file a motion for judgment on the evidence on that issue), trans. denied. Here, Strong failed to challenge the sufficiency of the evidence supporting the jury's general verdict in the trial court by filing either a motion for judgment on the evidence or a motion to correct error, and therefore, the issue is not available on appeal.

Conclusion

Strong waived his argument concerning the alleged error in the jury instructions by failing to object at trial. Also, Strong's claim of insufficient evidence is not available for appellate review because he failed to properly preserve the issue by filing a motion for judgment on the evidence or a motion to correct error.

Affirmed.

BAILEY, J., and CRONE, J., concur.