COURT OF APPEALS DECISION DATED AND FILED

October 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP1514

Cir. Ct. No. 2009CV188

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

ROBERT L. KIMBLE AND JUDITH W. KIMBLE,

PLAINTIFFS,

V.

LAND CONCEPTS, INC., JOHN E. STEVENSON AND JANE E. STEVENSON, TRUSTEES OF THE JOHN E. AND JANE E. STEVENSON REVOCABLE TRUST, DORENE E. DEMPSTER AND MARK F. HERRELL,

DEFENDANTS,

JOHN E. STEVENSON AND JANE E. STEVENSON,

DEFENDANTS-RESPONDENTS,

FIRST AMERICAN TITLE INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: D. TODD EHLERS, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. First American Title Insurance Company appeals a judgment, entered upon a jury verdict, awarding John and Jane Stevenson $29,738.49 in compensatory damages and $1,000,000 in punitive damages, and an order denying in part First American's postverdict motions. First American challenges certain rulings made by the circuit court prior to trial, a special verdict answer, and the amount of damages awarded by the jury. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In October 2004, Robert and Judith Kimble purchased real estate in the Town of Nasewaupee in Door County from Dorene Dempster and Mark Herrell. Dempster and Herrell had in turn purchased the property from John and Jane Stevenson who, in 1989, purchased what would become the Kimble lot, together with a lot north of what would become the Kimble lot from Robert Anderson and William Green, personal representatives of the estate of Gertrude Anderson. When the Stevensons sold the future Kimble lot to Dempster and Herrell, the Stevensons retained the lot to the north.

¶3 The Kimble property is land and water locked. To the north is the property owned by the Stevensons, to the east is Sawyer Harbor, and to the south and west is property owned by Land Concepts, Inc. The closest major roadway to the property is County Highway M, which is located west of the property, on the other side of land owned by Land Concepts.

¶4 When the Stevensons took title to their property, including what would later become the Kimbles' lot, title to the properties was transferred to the Stevensons by warranty deed which warranted an easement "in the use of a private road," which runs along the western boundary of both properties to County Highway M. That easement was warranted by the Stevensons when they sold the Kimble Lot to Dempster and Herrell, and it was warranted by Dempster and Herrell when they sold the lot to the Kimbles. At the time the Kimbles purchased their property from Dempster and Herrell, the only improved access from their property to County Highway M was over the private drive.

¶5 On the same day the Stevensons purchased their property, including the property that was eventually purchased by the Kimbles, Land Concepts recorded an easement, which granted to the "Estate of Gertrude P. Anderson, deceased" an access easement across its land to County Highway M, which was located approximately 150 feet to the west of the private drive. It is undisputed that the private drive utilized by the Kimbles to access County Highway M was not located within this easement granted by Land Concepts.

¶6 As part of their purchase, the Kimbles obtained a title insurance policy from First American. The policy insured the Kimbles "against loss or damage … sustained or incurred by the insured by reason of … [u]nmarketability of the title [or] … [l]ack of a right of access to and from the land." "Unmarketability of the title" was defined by the policy as:

> [A]n alleged or apparent matter affecting the title of the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

¶7 In 2008, the Kimbles attempted to sell the property. In March 2008, Land Concepts sent a letter to the Kimbles' realtor advising the realtor that the private drive the Kimbles used to access their property was on land owned by Land Concepts, and not subject to any access easement rights granted by Land Concepts to the Kimbles, and, therefore, the Kimbles did not have access rights from their property to County Highway M via that road and could not "convey any access rights to [County] Highway M" to any purchaser. Thereafter, in June 2008, Land Concepts notified the Kimbles' attorney that it intended to close the Kimbles' access over its property if the access issue was not promptly resolved. The Kimbles hired an attorney who in March 2008 notified First American that the Kimbles had a possible claim under the title insurance policy both due to lack of access and unmarketability due to lack of access. First American denied that the policy coverage had been triggered.

¶8 In 2009, the Kimbles brought suit against Land Concepts, the Stevensons, Dempster and Herrell, seeking a declaration regarding their rights in the private road used to access their property from County Highway M. The Kimbles later amended their complaint to add a claim of breach of title insurance against First American. The Kimbles eventually reached a settlement agreement with all of the defendants except First American. Under the terms of the settlement agreement, Land Concepts agreed to convey an easement over the existing private driveway for the benefit of the Stevensons' property and the Kimbles' property in exchange for $40,000. In addition, the Stevensons agreed to pay the Kimbles $10,000, and the Kimbles agreed to assign to the Stevensons their rights and interest in their First American title insurance policy, including any and all claims against First American stemming from First American's denial of coverage.

¶9 In August 2010, the Stevensons filed a cross-claim against First American, alleging breach of contract as well as breach of fiduciary duty and bad faith. Prior to trial, First American filed a motion in limine, seeking to preclude the introduction of any evidence that the Kimbles' title to the property was unmarketable as a result of lack of access. The court denied the motion.

¶10 At the evidentiary hearing on First American's motion in limine, however, the court went on to rule that whether coverage had been invoked under the policy due to non-marketability presented a question of law that it, not the jury, must decide. The court concluded that coverage had been invoked under the policy for both lack of access to the property and non-marketability due to the lack of access.

¶11 The matter proceeded to a jury trial on the issues of whether First American breached its contract with the Kimbles, whether the Kimbles suffered a loss as a result of any breach, and whether First American acted in bad faith. The jury found that First American breached its contract with the Kimbles, breached its duty of good faith in performing its contract with the Kimbles, and exercised bad faith in denying the Kimbles' requested defense of title and claim. The jury awarded the Stevensons $50,000 in compensatory damages for First American's breach of contract and $1,000,000 in punitive damages for First American's bad faith.

¶12 Following the jury's verdict, First American moved the circuit court to: (1) reduce the compensatory damages award to $28,485.49; (2) modify the jury's "yes" answer to the question of bad faith on the basis that there was insufficient evidence to support that finding; and (3) in the interest of justice, set aside the jury's verdict and order a new trial on the basis that the punitive damages

award was excessive. The circuit court agreed that the amount of compensatory damages should be reduced, but only to $29,738.49; however, it denied First American's other motions. First American appeals.

DISCUSSION

¶13 First American raises numerous challenges to the proceedings before the circuit court. We observe that these challenges fit into four main categories: (1) whether the Stevensons could prosecute the Kimbles' claims against First American; (2) whether the evidence was sufficient to establish that coverage under the policy was invoked; (3) whether First American acted in bad faith; and (4) whether punitive damages were awardable to the Stevensons for First American's bad faith and, if so, whether the amount awarded was excessive and therefore violated due process.[1] We address each issue in turn.

A. Stevensons' Right to Assert the Kimbles' Claims

¶14 First American contends that the Stevensons did not have the right to assert the Kimbles' claims against First American because those claims were not assignable and therefore any assignment of the Kimbles' claims to the Stevensons was void. First American argues that, under the terms of the policy, assignment of any of the Kimbles' claims against First American was not permissible. First American refers this court to four provisions in the policy, which include the definition of "insured," the definition of "insured claimant," a provision entitled

[1] To the extent that First American may have attempted to, or intended to, raise argument on appeal that we have not addressed, we have not done so because we deem those arguments insufficiently developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

"continuation of insurance after conveyance of title," and a provision entitled "determination, extent of liability and coinsurance." It asserts, without explanation, that under those provisions, "[a] policy claim may be made only by the named insured or a successor insured who takes title by operation of law."

¶15 We read First American's brief as also arguing that even if the Kimbles could assign their breach of contract claims to the Stevensons, they could not assign their tort claim for bad faith, and even if the Kimbles could assign their bad faith claim, the Stevensons still did not have the right to seek punitive damages. First American argues that there is no Wisconsin case permitting the assignment of a bad faith claim or breach of fiduciary duty in an insurance context, and it cites to four out-of-state cases for the proposition that bad faith punitive damages claims are not assignable.

¶16 Finally, First American argues that the Stevensons had no claims to assert against it because the Kimbles voided their policy by settling with the other defendants without providing notice to First American and by releasing the Stevensons from liability.

¶17 The Stevensons respond that First American failed to raise before the circuit court any of the above arguments. First American does not refute that assertion in its reply brief and has pointed to no place in the record where it raised any of these arguments below. Because First American has failed to refute the proposition that it failed to preserve any of its present arguments regarding the Stevensons' right to assert the Kimbles' claims for breach of contract and bad faith, we do not review the issue. *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); ***Schinner v.***

Schinner, 143 Wis. 2d 81, 94 n.5, 420 N.W.2d 381 (Ct. App. 1988) (an appellate court need not review issues not shown to have been raised in the circuit court).

B. Coverage Under the Policy

¶18 First American contends that the circuit court erred in determining, prior to trial, that coverage was invoked under the Kimbles' title insurance policy.

¶19 The interpretation of the contractual language contained within an insurance policy presents a question of law that is reviewed independently by this court. ***Zurich Am. Ins. Co. v. Wisconsin Physicians Servs. Ins. Corp.***, 2007 WI App 259, ¶11, 306 Wis. 2d 617, 743 N.W.2d 710.

¶20 The Kimbles' policy provides coverage in the event that the Kimbles suffered loss or damages due to the "[u]nmarketability of the title" or the "[l]ack of a right of access to and from the [insured] land." The circuit court determined that coverage under the policy was invoked because the Kimbles did not have a right of access to their property and, because of that lack of access, the title to the property was unmarketable. First American argues that, contrary to the court's determination, the Kimbles had three points of access to their property.

¶21 First American first claims that the Kimbles had access to their property via the access easement granted by Land Concepts to the "Estate of Gertrude P. Anderson, deceased" as beneficiary in 1989, which ran along the western side of the Kimbles' property. First American claims on appeal that this easement remained valid, not having been terminated by either Land Concepts or any provision within the easement.

¶22 The access easement was unilaterally drafted and signed by a representative of Land Concepts, and then filed with the register of deeds in 1989.

The easement made Land Concepts' property to the west of the Kimbles' property the servient estate and provided:

> The easement shall exist for benefit of beneficiary, and for beneficiary's business and social invitees. The easement will also inure to the benefit of beneficiary's successors and assigns, but only in the event beneficiary complies with the terms and provisions herein below set forth.
>
> In the event it should be the desire of beneficiary (or any successor of beneficiary), to make the terms and provisions of the easement available to any successor, assign, or grantee; beneficiary shall first provide to [Land Concepts], a copy of a bona fide good faith Offer to Purchase as received from such proposed transferee or grantee. Beneficiary shall fully disclose to [Land Concepts] all terms, conditions, agreements, and understandings between beneficiary and such proposed grantee or transferee, and shall make the same terms, provisions, and conditions available to [Land Concepts] for a period of ten business days following receipt by [Land Concepts] of such written notice and all such disclosures….
>
> ….
>
> [T]he "first right of refusal" herein provided shall be available to [Land Concepts] in the event of any subsequent proposed conveyance to any subsequent proposed grantee or transferee, in accordance with the terms and provisions hereof.
>
> Any beneficiary desiring to list its property for sale may request of [Land Concepts], a waiver of [Land Concepts'] "right of first refusal" which [Land Concepts] may—but shall not be obligated to—furnish. No such waiver shall be valid for any period of time exceeding 6 months.
>
> ….
>
> In the event that any party or entity shall record any deed or conveyance (including—but not limited to—a Land Contract or Lease with Option or a Lease for a term of 5 years or more), which conveyance purports to convey lands subject to any individual easement, or proports [sic] to convey an interest in such easement; and in the further event that the party or entity making or attempting to make

> such conveyance has not obtained a waiver as herein set forth, or has not offered to [Land Concepts] the "right of first refusal" as herein specified; then immediately upon the recording or attempted recording of such conveyance any individual easement subject to these uniform terms and provisions shall immediately cease and terminate; and [Land Concepts] shall be authorized to record a termination statement in the office of the Register of Deeds in and for the County where said lands are situated, evidencing the termination of such easement.

¶23 In response, the Stevensons argue that prior to this appeal, First American denied the validity of any access via the west easement. They note that in a March 2008 letter, Donald Schenker, assistant vice president of First American, identified three problems with this easement: (1) it was made out to a nonexistent legal entity, namely the "Estate of Gertrude P. Anderson, deceased"; (2) there were problems regarding whether there had been proper delivery of the deed; and (3) contrary to WIS. STAT. § 706.02(1)(b) (2009-10),[2] the conveyance failed to identify the land that the easement was purported to benefit. The Stevensons further argue that at no time has Land Concepts been given a right of first refusal for the purchase of the Stevensons' and Kimbles' property, and, therefore, the easement terminated by its own terms.

¶24 First American does not dispute the Stevensons' arguments. As noted above, in paragraph 16, arguments asserted by a respondent on appeal and not disputed in the appellant's reply may be taken as admitted. ***Schlieper***, 188 Wis. 2d at 322. Because First American has not explained on appeal why the easement did not terminate by its own terms when the Stevensons' and Kimbles' land was originally conveyed to the Stevensons in 1989, or any time thereafter

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

upon transfer, and further has not explained to this court why the easement is not invalid for any of the reasons identified by Schenker in his March 2008 letter, we take First American's silence as a concession and we will not address the issue. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App.1999) ("An argument to which no response is made may be deemed conceded for purposes of appeal.")

¶25 First American argues that the Kimbles also had access to their property from the south, along Idlewild Woods Drive. Idlewild Woods Drive is situated south of the Kimbles' property and runs from the south in a north-easterly direction toward the western boundary of the Kimbles' property. The completed portion of Idlewild Woods Drive stops approximately twenty-five feet from the Kimbles' property. The area between the completed portion of the road and the Kimbles' property is undeveloped land.

¶26 First American claims that since there is "unrebutted evidence" that that Idlewild Woods Drive had been platted to provide access to the property, it is "nonsense" for the Stevensons to claim there was no access to the Kimbles' property via Idlewild Woods Drive because that road was not completed all the way to the Kimbles' property. We read First American's brief as arguing that because the plat shows that Idlewild Woods Drive is completed to the Kimbles' property, the fact that it has not been completed, and may never be completed, is irrelevant under the title insurance policy. However, First American does not explain why we should conclude that this is true and does not cite to any legal authority to support its position. Accordingly, we do not address this argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments and arguments lacking citation to legal authority need not be addressed).

¶27 Finally, First American argues that the Kimbles had access to their property from the north via the private road previously utilized by the Kimbles to access their property. First American argues that the Stevensons should have been estopped from arguing that the "north easement" is invalid for a number of reasons. First American has not, however, shown that it raised this argument before the circuit court. Again, as a general rule, we do not review issues not shown to have been raised before the circuit court. ***Schinner***, 143 Wis. 2d at 94 n.5. Furthermore, First American's estoppel claim aside, First American has not argued or shown that the court was wrong in concluding that the Kimbles did not have the right to use what First American refers to as the "north easement" to access their property. Accordingly, we do not further address this issue.

¶28 First American also challenges the circuit court's conclusion that a lack of access rendered the Kimbles' property unmarketable, arguing that a lack of access does not make a property unmarketable. However, because we affirm the court's ruling that the Kimbles' property lacked access, a covered event under the policy, we do not address this argument. *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. Bad Faith

¶29 First American contends that there was not sufficient evidence to support the jury's answer with respect to bad faith and, therefore, the circuit court erred in denying its motion to modify that answer.

¶30 Any party may move the court to change an answer in a verdict on the basis that there was insufficient evidence to support the answer. *See* WIS. STAT. § 805.14(5). However,

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, *there is no credible evidence to sustain a finding in favor of such party*.

Section 805.14(1) (emphasis added). When we review a circuit court's denial of a motion to change verdict answers, we must affirm if there is *any* credible evidence to support the jury's verdict, even if contradictory evidence is stronger and more convincing. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995).

¶31 Bad faith is a tort "separate and apart from a breach of contract." ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 686, 271 N.W.2d 368. "It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract," and as such, separate damages may be recovered for bad faith and for breach of contract. ***Id.*** at 687.

¶32 To prove bad faith against an insurance company, the plaintiff must establish: (1) the insurance contract provided coverage and required payment by the insurer; (2) there was no reasonable basis for the insurer to deny the insured's claim for benefits under the policy; and (3) the insurer knew of, or recklessly disregarded, the lack of a reasonable basis to deny the claim. ***Brethorst v. Allstate Prop. & Cas. Ins. Co.***, 2011 WI 41, ¶¶36, 49, 53-54, 334 Wis. 2d 23, 798 N.W.2d 467; ***Anderson***, 85 Wis. 2d at 692. *See also* WIS JI—CIVIL 2761. If an insurance company conducted a thorough investigation of the facts and circumstances giving rise to the insured's claim and reasonably concluded that the claim was fairly debatable or questionable, the denial of the claim is not in bad faith. WIS JI—CIVIL 2761.

¶33 First American argues that the jury's finding that it acted in bad faith must be reversed because the Stevensons did not prove by clear and convincing evidence that there was a breach of contract by First American, i.e., a wrongful denial under the insurance contract. Alternatively, First American argues that their denial of the claim was not in bad faith because coverage under the policy was at least "fairly debatable."[3]

¶34 For the reasons discussed above in paragraphs 18-27, First American is incorrect that the Stevensons failed to establish that the Kimbles suffered a covered loss under the policy. Furthermore, we consider First American's assertion that coverage under the policy was "fairly debatable" to be conclusory and insufficiently developed, and reject it on that basis. *See* ***Pettit***, 171 Wis. 2d at 646-47 (an appellate court need not consider conclusory assertions and undeveloped arguments).

¶35 First American also argues that the judgment should be vacated because "[t]he [circuit] court's instructions and rulings" prevented it from presenting an effective defense to the Stevensons' bad faith claim. Those "instructions and rulings" include allowing the Stevensons' attorney to inform the jury that the court had already ruled on the issues of access, marketability and coverage under the policy, and precluding First American from presenting evidence about the Kimbles' settlement with the other defendants. First American

[3] First American also argues that bad faith was not established because the Stevensons failed to present evidence that First American acted with an "evil motive." Proof of "evil motive" is not a prerequisite to a finding of bad faith. A showing of "evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct" is, however, a requirement in order for punitive damages to be awarded for bad faith. ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 697, 271 N.W.2d 368 (1978).

has not demonstrated that it raised an objection to this information before the circuit court and, as we have explained, we do not review issues not shown to have been raised in the circuit court. ***Schinner***, 143 Wis. 2d at 94 n.5.

D. Damages

¶36 First American argues that the compensatory and punitive damages awarded by the jury must be nullified.

1. Compensatory Damages

¶37 First American argues that any compensatory damages awardable to the Stevensons is limited to one-half of the cost to buy the new access easement. First American claims that, because the cost of the new easement was $40,000, the loss payable by it is no more than that amount. It further argues that half of the $40,000 is payable by the Stevensons because the easement benefits both the Kimbles' and the Stevensons' property. First American did not raise this argument in its postverdict motion. Because the issue was not raised before the circuit court, it will not be considered now. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

2. Punitive Damages

¶38 First American argues that the $1,000,000 punitive damages award violated due process because the amount awarded was excessive.

¶39 Punitive damages may be imposed to punish unlawful conduct and deter its repetition. ***Trinity Evangelical Lutheran Church & Sch.—Freistadt v. Tower Ins. Co***., 2003 WI 46, ¶46, 261 Wis. 2d 333, 661 N.W.2d 789. Although

the award of punitive damages lies within the discretion of the jury, the jury's discretion in awarding punitive damages is not unfettered. *See* ***id*.**

¶40 The Due Process Clause of the Fourteenth Amendment imposes substantive limits on the size of a punitive damages award. ***Id.***, ¶49. "An award is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages, or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing." ***Id.***, ¶50. To determine whether an award of punitive damages is excessive, the United States Supreme Court has set forth, and the Wisconsin Supreme Court has applied, a three-part test. *See* ***BMW of North America, Inc. v. Gore***, 517 U.S. 559, 575 (1996); ***Trinity***, 261 Wis. 2d 333, ¶¶52, 57-68. This test requires a court to weigh: (1) the degree of egregiousness or reprehensibility of the conduct; (2) the disparity between the harm, or the potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct. ***BMW***, 517 U.S. at 575; ***Trinity***, 261 Wis. 2d 333, ¶52. While these are the most significant factors, other factors may be relevant in light of the facts in the case at hand, including the degree of any malicious intent and whether the punitive damages award bears a reasonable relationship to the award of compensatory damages. ***Trinity***, 261 Wis. 2d 333, ¶¶53, 69. In weighing these factors against the facts of a particular case, "the evidence must be viewed in the light most favorable to the plaintiff, and a jury's punitive damages award will not be disturbed, unless the verdict is so clearly excessive as to indicate passion and prejudice." ***Id.***, ¶56.

¶41 When a punitive damages award is appealed as unconstitutionally excessive, we review the award de novo. ***Id.***, ¶¶47-48. However, we do not

undertake that review here because we consider First American's argument to be insufficiently developed, and reject First American's arguments on that basis.[4]

CONCLUSION

¶42 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[4] First American claims that the punitive award in this case is unconstitutionally excessive because it "does not correlate with five of the six factors which this court must weigh." However, in support of this assertion, it sets forth only broad and conclusory statements without citation to the record and without citation to legal authority.