COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP537 **Cir. Ct. No. 2010CV3853**

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

JOHN BOROWSKI,

PLAINTIFF-APPELLANT,

V.

STEWART TITLE GUARANTY COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Reversed and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. John Borowski appeals from a judgment dismissing his breach of contract claim against Stewart Title Guaranty Company following a jury trial. Borowski argues that the jury's answers on the special verdict form

were inconsistent. We agree with Borowski, and therefore, we reverse the judgment and remand the case back to the trial court for further proceedings.

BACKGROUND

¶2 On March 24, 2000, Borowski and Ronnie and Sandra Weinhold executed a Real Estate Sales Agreement to sell Borowski a single-family residence in Oak Creek, Wisconsin. Borowski's parcel was part of a significantly larger tract of land owned by the Weinholds. To provide the Weinholds with access to the property they retained, Borowski agreed to convey to the Weinholds a four-foot wide, non-exclusive, ingress-and-egress easement on the easternmost edge of Borowski's parcel.

¶3 In conjunction with the sale, Stewart Title conducted a title search and issued a title insurance commitment to Borowski, with an effective date of March 22, 2000. Thereafter, on April 5, 2000, after entering into the Real Estate Agreement with Borowski, but before closing on the sale of the property, the Weinholds surreptitiously filed a Driveway Easement Agreement ("the Easement") that conveyed to themselves, as owners of the parcel of land they retained, exclusive rights to the four-foot wide strip of land on the easternmost edge of Borowski's parcel. The Easement further obligated the owner of Borowski's parcel to indemnify the Weinholds "from all liability, suits, actions, claims, costs, damages, and expenses of every kind and description, including court costs and legal fees." There is no dispute that the Weinholds filed the Easement after the title search was conducted and after the effective date of the insurance commitment issued to Borowski by Stewart Title.

¶4 Borowski first became aware of the Easement in November 2004 when the Weinholds, claiming a right to exclusive use of the Easement,

constructed a concrete driveway on the four-foot wide strip of land conveyed by the Easement. Borowski claimed that the driveway was unsafe because in some places it was elevated approximately one foot higher than the surrounding ground level. Unable to settle the dispute with the Weinholds, Borowski tendered a claim to Stewart Title.

¶5 Under the provisions of the title policy, Stewart Title had the right to: (1) commence an action to remove the Easement from the title; or (2) pay Borowski either the $139,500 insurance limit or "the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy." Stewart Title chose the latter, to wit, it opted to pay Borowski for the diminution in value caused by the recording of the Easement.

¶6 To determine the diminution of value, Stewart Title hired an appraiser who appraised the value of the land within the Easement at $3500. Based on the appraisal, Stewart Title offered Borowski $3500, but Borowski rejected the offer, asserting that the amount did not properly compensate him for the loss of value to his property.

¶7 Borowski filed this lawsuit against Stewart Title. In the complaint, he argued that "Stewart Title breached its obligations under the title insurance policy by failing to defend Borowski's title or in the alternative to properly compensate Borowski for the monetary damages he sustained as a result of the recording of the [Easement]."

¶8 Stewart Title filed a motion for summary judgment, arguing, as relevant to this appeal, that it did not breach the title insurance policy because it offered and tendered a check to Borowski for $3500, the amount Stewart Title

claims Borowski lost as a result of the Easement. Borowski countered that an issue of fact existed as to the economic impact of the Easement on the value of his property, arguing that the elevated driveway rendered his property unsellable.

¶9 The trial court agreed with Borowski and found that the title "policy was a valid contract with terms that were violated and resulted in damages to [Borowski]." The court went on to conclude that "the basis for [Borowski's] claim centered on the dispute regarding the purported difference in value," that is, that an issue of fact existed regarding "the value of the insured estate" under the terms of the title policy before and after the Easement was filed. Because the court concluded that "a determination of the value of the defect" could not be determined on summary judgment, the case proceeded to trial before a jury.

¶10 At trial,[1] Borowski testified that he had received a check from Stewart Title for $3500 but that he did not cash the check "[b]ecause the amount that they offered in no way, shape, or form repaired the damages as a result of the driveway easement agreement" and the amount did not compensate him for the improvements the Easement prevented him from making to his property. Borowski told the jury that his loss in mortgage equity on the property because of the Easement was $70,000 and his loss of use of the four-foot easement was $3500.

¶11 Following the trial, the special-verdict form was submitted to the jury, consisting of two questions:

[1] We note that the record contains only excerpts from the trial transcripts.

> **QUESTION 1:** Did Stewart Title Guaranty Company breach the Policy?
>
> **Yes: _____ No: _____**
>
> **Regardless of how you answer Question 1, please answer Question 2.**
>
> **QUESTION 2:** On the date John K. Borowski tendered his claim to Stewart Title, what was the difference in value of the property owned by Mr. Borowski as insured by Stewart Title and the value of the property subject to the Driveway Easement Agreement?
>
> **ANSWER:** $_____

¶12 During closing arguments, Borowski's counsel explained Question 1 to the jury thusly:

> Now, as [the trial court] instructed you, there's going to be two questions on the verdict form. The first question is: Did Stewart Title breach the policy of title insurance? *That question depends upon whether or not Stewart Title, when it tendered a thirty-five-hundred-dollar check to Borowski, was that check sufficient to discharge its obligations under the title policy.*
>
> If the answer to that question is no, then you should answer the first verdict question yes. So did Stewart Title fulfill its obligations under the title policy by simply tendering a thirty-five-hundred-dollar check to Mr. Borowski. I submit the answer is no.

(Emphasis added.) Borowski's counsel then argued that issuing a $3500 check did not meet Stewart Title's obligations under the title insurance policy because it failed to offer the proper diminution of value to Borowski's property due to the Easement; thus, Stewart Title breached the title policy. Stewart Title's counsel also focused on Stewart Title's obligation under the title policy to pay the proper diminution of value, telling the jury during closing arguments that "Stewart Title's only obligation to Mr. Borowski [was] to pay him the difference between the value

of the estate as insured and the value of the estate as subject to the driveway easement agreement."

¶13 Following deliberations, the jury found that: (1) Stewart Title did *not* breach the title policy; and (2) the difference in value of the property owned by Borowski as insured by Stewart Title and the value of the property subject to the Easement was $73,500.11.

¶14 Borowski filed a post-verdict motion for a new trial on the grounds that the jury's answer to Question 1 was inconsistent with its answer to Question 2. Borowski asserted that the answer to Question 2 determined the amount of money Stewart Title was required to offer to Borowski to fulfill its contractual obligation under the title policy. Because the jury found the diminution of value to Borowski's policy to be $73,500.11, that is, substantially greater than Stewart Title's $3500 initial offer, Borowski argued that the jury could not also find that Stewart Title did not breach the title policy.

¶15 The trial court denied the motion. The court reasoned that the jury's finding that Stewart Title did not breach the title policy could represent the jury's belief that Borowski's damages resulted from the conduct of a party other than Stewart Title, presumably the Weinholds. Accordingly, the court found that the jury's verdict was not inconsistent. Borowski appeals.

DISCUSSION

¶16 The sole issue before us on appeal is whether the jury's answers on the special verdict form—that Stewart Title did not breach the title policy and that the diminution of value to Borowski's property was $73,500.11—are inconsistent. A verdict is inconsistent when "the jury's answers are 'logically repugnant to one

another.'" *See* ***Kain v. Bluemound E. Indus. Park, Inc.***, 2001 WI App 230, ¶40, 248 Wis. 2d 172, 635 N.W.2d 640 (citation omitted). "Inconsistency exists when answers cannot be reconciled or cannot be reconciled without eliminating or altering an answer." ***Reuben v. Koppen***, 2010 WI App 63, ¶13, 324 Wis. 2d 758, 784 N.W.2d 703. We uphold a jury verdict on review for inconsistency "when the record is such that the jury could have made both of the findings that are claimed to be inconsistent." ***Sharp ex rel. Gordon v. Case Corp.***, 227 Wis. 2d 1, 20, 595 N.W.2d 380 (1999).

¶17 Stewart Title argues at length that our review in this case is deferential and that we cannot overturn the jury's verdict unless there is no credible evidence to support it. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (setting forth the standard of review when the issue before the court is the sufficiency of the evidence). However, in so arguing, Stewart Title attempts to change the question before the court. The question before us on appeal is *not* whether there is sufficient evidence to support the jury's verdicts, but rather whether the jury's answers on the special verdict form are inconsistent with each other. Because whether "the jury's answers are 'logically repugnant to one another,'" *see* ***Kain***, 248 Wis. 2d 172, ¶40, presents us with a question of law, our review is *de novo*, *see* ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶18 Borowski argues that the issue before the jury was whether Stewart Title breached the title policy by offering Borowski less than the diminution of value to his property resulting from the Easement. Borowski contends that the jury's determination that the diminution of value ($73,500.11) substantially exceeded Stewart Title's offer to Borowski ($3500) conclusively establishes that Stewart Title breached the title policy. As such, he argues that the verdict answers

are inconsistent and that we should remand this case back to the trial court for a new trial.

¶19 Nowhere in its brief does Stewart Title meaningfully rebut Borowski's assertion that the issue before the jury was whether Stewart Title breached the title policy by offering Borowski less than the diminution of value to his property resulting from the Easement, nor could it.[2] *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted). Throughout the trial, Stewart Title attempted to defend itself against that breach on the grounds that it properly offered Borowski $3500 under the terms of the title policy. Thus, both parties defined the breach argument in terms of whether Stewart Title paid the proper diminution in value.

¶20 Question 1 of the special-verdict form did not clearly define what breach the jury was being asked to find, asking the jury: "Did Stewart Title Guaranty Company breach the Policy?" However, the trial record, and especially the parties' respective closing arguments, clarified that the particular breach that the special-verdict form referred to was whether Stewart Title satisfied its obligation under the title policy to pay Borowski the proper diminution of value to Borowski's property resulting from the Easement. Notably, no other theory of

[2] In its response brief, Stewart Title conclusorily alleges that "the jury was presented with evidence that Stewart Title did not breach the [title policy]." Stewart Title supports this assertion with a string cite of record citations. Our review of each of the record citations provided by Stewart Title reveals that in each instance the evidence being presented to the jury or the argument being made by counsel regarded the diminution of value to Borowski's policy and Stewart Title's $3500 offer. Nowhere in its submissions to this court has Stewart Title alleged and supported with record citations that the breach of the title policy, as argued to the jury, was anything other than Stewart Title's failure to offer Borowski the proper diminution of value.

breach was advanced by either party at trial, and as we set forth above, the parties agree that that was the question before the jury.

¶21 During closing statements, Borowski's counsel explained to the jury that whether Stewart Title breached the title policy under Question 1 "depends upon whether or not Stewart Title, when it tendered a thirty-five-hundred-dollar check to Borowski, was that check sufficient to discharge its obligations under the title policy." Stewart Title's counsel told the jury that "Stewart Title's only obligation to Mr. Borowski is to pay him the difference between the value of the estate as insured and the value of the estate as subject to the driveway easement agreement." In other words, both parties told the jury that Stewart Title had an obligation under the title policy to pay Borowski the diminution of value to his property resulting from the Easement; an offer substantially less than the diminution of value would be insufficient to meet Stewart Title's responsibilities.

¶22 The jury's answer to Question 2—that "the difference in value of the property owned by Mr. Borowski as insured by Stewart Title and the value of the property subject to the Driveway Easement Agreement" is $73,500.11—cannot be reconciled with the jury's conclusion that Stewart Title did not breach the title policy when it offered Borowski $3500. The parties each told the jury that Stewart Title breached the title policy if it did not offer him the proper diminution of value. If the diminution of value, as found by the jury, was $73,500.11, Stewart Title's $3500 offer could not have met its obligations under the policy. Therefore, the jury's answers cannot be reconciled and Borowski is entitled to a new trial. *See* ***Reuben***, 324 Wis. 2d 758, ¶13.

¶23 In coming to the opposite conclusion, the trial court found:

> That in finding that Stewart Title did not commit any breach of the Policy, the jury presumably concluded that Stewart Title, in making the initial settlement offer to Borowski, followed the proper procedure as set forth in the Policy; and further, that in finding that Borowski's damages were actually over and above the amount of the initial settlement, the verdict infers that the jury believed that those damages were the result of the conduct of a party other than Stewart Title, likely Ronald and Sandra Weinhold[.]

On appeal, Stewart Title asks us to affirm the trial court on those same grounds.

¶24 The problem with the trial court's finding is that the issue before the jury, as explained to the jurors by the parties in their closing arguments, was whether Stewart Title breached the title policy by failing to offer Borowski the *proper* diminution of value. The *cause* of the diminution in value—the Weinholds improper filing of the Easement—was irrelevant and immaterial. Notably, the Weinholds were not parties to the title policy. And, if the diminution of value was in fact $73,500.11 as the jury found, then Stewart Title, as a matter of law, breached the title policy by only offering Borowski $3500. Under the terms of the title policy, Stewart Title was required to pay the diminution of value of the property, regardless of who or what caused that diminution. The jury's finding that "the difference in value of the property owned by Mr. Borowski as insured by Stewart Title and value of the property subject to the Driveway Easement Agreement" is $73,500.11, is dispositive of the question of whether Stewart Title breached the title policy when it offered Borowski $3500. As such, we are obligated to reverse the judgment entered by the trial court and remand for a new trial. *See* ***Westfall ex rel. Terwilliger v. Kottke***, 110 Wis. 2d 86, 98, 328 N.W.2d 481 (1983) ("[W]hen a verdict is inconsistent, such verdict, if not timely remedied by reconsideration by the jury, must result in a new trial.").

CONCLUSION

¶25 The parties argued to the jury that the title policy obligated Stewart Title to compensate Borowski for the damages he sustained as a result of the Easement. The fact that Stewart Title followed its procedures and made Borowski an offer was insufficient to discharge those duties. The jury's determination that the actual diminution of value to Borowski's property substantially exceeded the $3500 offer cannot be reconciled with the jury's conclusion that Stewart Title did not breach the title policy. Consequently, we conclude that the jury's answers on the special-verdict form are inconsistent; as such, we reverse the judgment dismissing Borowski's complaint against Stewart Title and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.