COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2104 **Cir. Ct. No. 2007CV219**

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

KRIS WOELFEL, JULIE WOELFEL AND CITY VIEW DAIRY, LLC,

PLAINTIFFS-RESPONDENTS,

V.

HOMESTEAD MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

Before Neubauer , P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Homestead Mutual Insurance Company appeals from a jury's verdict that a silo on the dairy farm operated by Kris and Julie Woelfel and City View Dairy, LLC (collectively the Woelfels), collapsed due to an explosion and awarding the Woelfels bad faith and punitive damages because

of Homestead's denial of coverage for the damages caused by the collapse. Homestead raises five issues on appeal: whether the jury instruction defining "explosion" was proper, whether the trial court properly exercised its discretion in admitting into evidence burned barn boards produced just one week before trial, whether a mistrial should have been granted due to improper closing argument, and whether bad faith and punitive damages claims should have been submitted to the jury. We affirm the judgment.

¶2 About 10:30 p.m. on September 15, 2006, the silo at the Woelfels' City View Dairy collapsed. It fell on the adjacent dairy barn and killed or maimed several cows. Concrete debris landed in all directions and up to several hundred feet away. There were no witnesses to the event. Neighbors to the farm reported hearing a "sonic like boom," "whoof," or "rolling thunder" sound that lasted several seconds followed by a "loud crash." The silo had been inspected and then filled with fresh silage earlier that day.

¶3 The Woelfels were insured by Mount Calvary Mutual Insurance Company. When the silo failed, Mount Calvary was merging with Homestead, so Homestead took over and completed the claim investigation. The insurance policy provided coverage for eleven listed perils, including fire, wind storm, and explosion; there was no coverage for collapse due to deterioration or structural failure of the silo. The cause of the collapse was a point of disagreement between the Woelfels and Homestead.

¶4 The day following the collapse, an independent adjuster, Bob Berens, visited the farm on Homestead's behalf. He advised the Woelfels that if the silo had simply failed, the lost cows would be covered but there would be no coverage for the damage to the silo or barn. Homestead sent a structural engineer,

Tim Grocholski, out to investigate at the farm. On September 19, 2006, Grocholski and Homestead's general manager, George Tipler, visited the farm. While at the farm, Grocholski advised Tipler that the silo did not seem to have very many signs of deterioration but that there were some areas of concern. On September 22, 2006, Tipler returned to the farm to look for possible signs of an explosion, particularly the distance at which debris had landed. He had the Woelfels execute a "non-waiver agreement" that day which provided notice that there was an issue with coverage. By September 26, 2006, Grocholski advised Homestead that, in his opinion, the silo had just failed and the collapse was not due to an explosion. Tipler told the Woelfels that the tentative finding was that the collapse was caused by failure and would not be covered. On October 9, 2006, Homestead contacted Bruce Johnson of Wisconsin Silos and asked him to determine the cause of the collapse. Johnson visited the farm the next day. Johnson's October 16, 2006 written report concluded that twenty-five percent of the original concrete wall of the silo had deteriorated and exposed rebar to silo acids. He opined that the collapse was the result of failure caused by rapid filling of the silo, settling, poor maintenance, and structural weakness. A formal denial of coverage was made by a December 7, 2006 letter.

¶5 The Woelfels commenced this action to recover their loss and essentially to determine coverage. The amended complaint alleged bad faith for Homestead's denial of their claim without reasonable investigation and without a reasonable basis in law or fact. At the jury trial they presented evidence that during the clean-up of the collapsed silo burned feed, burned debris, and burn odors were discovered. The Woelfels' expert, Mark Beavers, had inspected the site on October 10, 2006. Beavers indicated that while at the site with Johnson, Homestead's silo expert, Johnson observed a burnt odor but did little more than a

few minutes of digging amongst the silage. Beavers concluded that a fire started in the feed/mixing room triggering a grain dust explosion in the silo chute causing the silo to collapse. Dr. Alfred Szews, an electrical engineer and forensic fire and explosion investigator, basically concurred. The Woelfels also pointed out that initial loss notices completed by Homestead's representatives suggested that there had been a "barn fire" or "possible site explosion," but that Grocholski had not been provided that information. Grocholski acknowledged that if there had been a report of fire or the discovery of burnt material, he would have wanted to know that when he was investigating the cause of the collapse.

¶6 During the trial, Homestead moved for a directed verdict on both bad faith and punitive damages. Those motions were taken under advisement. The jury determined that an explosion was the cause of the silo's collapse. It also found that Homestead exercised bad faith in denying the claim and intentionally disregarded the Woelfels' rights. The jury awarded $700,000 as punitive damages. On motions after verdict Homestead renewed its claim that there was no basis for a bad faith and punitive damage verdict, it sought remittitur on damages, and asked for a new trial. Homestead's motions were denied.

¶7 We first address Homestead's claim that the jury instruction defining "explosion" erroneously stated the law as applied to the facts of this case. The trial court has broad discretion when instructing a jury. ***White v. Leeder***, 149 Wis. 2d 948, 954, 440 N.W.2d 557 (1989). No grounds for reversal exist if the overall meaning communicated by the instruction as a whole was a correct statement of the law and the instruction comported with the facts of the case. ***Id.*** at 954-55.

¶8 Homestead's insurance policy does not define the peril "explosion." ***Aetna Cas. & Sur. Co. v. Osborne McMillan Elevator Co.***, 26 Wis. 2d 292, 299-300, 132 N.W.2d 510 (1965), teaches that "an explosion as applied to silage in a silo or contents of a container must include the element of an active force independent of or in addition to the force of weight and height of the contents which seek a sudden and violent release by breaking the container." The ***Aetna Cas.*** court explained:

> In cases of confined substances if the container fails because of structural weakness so as to let out the contents as distinguished from the contents bursting out because of its force, there is no explosion even though it might be said the tank ruptured or burst open. The probability of grain like water which is not an explodable substance being an element of an explosion consists in its ability to contain or harbor active forces or energy. In explosions involving a nonexplodable substance there must be an internal active force created which breaks out of its confinement. In the case of grain such active force must be in addition to that of the normal static force exerted on the inside of a container because of the weight and position of the grain.

Id. at 301-02.

¶9 Here the jury was instructed:

> An "explosion" is a violent expansion or bursting that is accompanied by noise and is caused by a sudden release of energy. To be an "explosion," the event must include an active force independent of or in addition to that of the normal static force exerted on the inside of a container because of the weight and position of the contents. With a non-explodable substance, there must be an internal active force created which breaks out of its confinement. In cases of confined substances, if the container fails because of structural weakness so as to let out the contents as distinguished from the contents bursting out because of its force, there is no explosion even though it might be said the container ruptured or burst open.

¶10 The instruction uses the same words that the ***Aetna Cas.*** court utilized to describe an explosion in the circumstances of grain storage. It was not a misstatement of the law. Homestead's requested instruction is not measurably different.[1] Both require the need for an active force in addition to the force of the weight and height of the contents of the silo. Moreover, the Woelfels' claim was that the explosion was precipitated by fire. By reference to the need for an additional active force, the jury was properly instructed to consider whether something other than the silo's contents caused an explosion and the silo's collapse. There was no error in the jury instruction.

¶11 Eleven days before trial and after the time for discovery had expired, the Woelfels gave notice that they intended to cut two charred boards from their original location within the barn and introduce them as trial exhibits. Homestead objected to admission of the boards. It claimed surprise since during his discovery deposition, Kris Woelfel indicated no knowledge of any burnt wood or other combustible material. In admitting the evidence, the trial court referred to WIS. STAT. § 804.01(5)(b) (2009-10),[2] which requires a party to amend a prior

[1] We recognize that Homestead sought to tailor the instruction to address the terms its own expert used in describing the dynamic or active forces imposed on the bottom walls of the silo as the silage compacts after filling. To that end, Homestead's proposed instruction removed reference to the "normal static force" inside a filled silo and replaced it with the simple term "pressure." Homestead requested the following instruction:

> You are instructed that an explosion is a violent expansion or bursting that is accompanied by noise and is caused by the sudden release of energy. To be considered an explosion as applied to the Woelfel silo, there must be an active force independent of or in addition to the pressure resulting from the weight of the contents in the silo. A force or pressure resulting from the settling of the silage within the silo which causes the silo to split open and release its contents is not an explosion.

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

discovery response when the party knows the response is no longer correct. The trial court found that the Woelfels acted in good faith in supplementing their response by disclosing the discovery of the burnt boards after conferring with witness Peter Ahrens, a contractor who performed clean-up and demolition at the farm after the collapse of the silo.[3] The trial court further indicated that it had weighed the potential prejudice to the defense against the goal of presenting the jury with all relevant evidence and found the balance to support admissibility of the evidence.

¶12 Homestead argues that the trial court erroneously exercised its discretion in admitting the burnt boards into evidence. The admission or exclusion of evidence is a discretionary determination that will be upheld if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990). Under WIS. STAT. § 904.03, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice "or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The balancing test favors admissibility. *See* ***Lievrouw***, 157 Wis. 2d at 350. "Although [§] 904.03 does not list 'surprise' as a specific ground for excluding evidence, testimony which results in surprise may be excluded if the surprise would require a continuance causing undue delay or if surprise is coupled with the danger of prejudice and confusion of issues." ***Lease Am. Corp. v. Insurance Co. of N. Am.***, 88 Wis. 2d 395, 400, 276 N.W.2d 767 (1979).

[3] Ahrens testified that he told Kris Woelfel on the first day of clean-up that they found some burnt boards and some other burned material. He indicated that Kris was "kind of beside himself" at that time.

¶13 The trial court recognized the probative value of the burnt boards when it looked at the desirability of presenting the jury with all relevant evidence. The trial lasted six days and the admissibility of the burnt boards was discussed on the first day of the trial. When the issue was decided on day three, Homestead did not suggest that a continuance would be necessary. Indeed the trial court accommodated Homestead's request that its fire/explosion expert be permitted to visit the farm and the spot where the boards were removed before the expert's testimony. Homestead claims prejudice because its expert, Robert Schroeder, testified based on the sworn testimony of Kris Woelfel and Beavers that besides small amounts of burnt feed, there were no other burnt materials, and that testimony turned out to be incorrect. Homestead does not provide a record citation to any portion of Schroeder's testimony wedded to Kris Woelfel's and Beavers's observation of the extent of burnt material.[4] We will not make an independent search of the record to find the evidence supporting the claim of prejudice. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. '"Unfair prejudice' does not mean damage to a party's cause.... Rather, unfair prejudice results where the proffered evidence … would have a tendency to influence the outcome by improper means...." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). There is no suggestion that the burnt boards would influence the jury by improper means. We conclude the trial court properly exercised its discretion admitting the burnt boards into evidence.

[4] Robert Schroeder testified on the last day of trial, a Monday following a weekend break in the trial.

¶14 During closing argument, the Woelfels' counsel made the following statement:

> So, after you have found answers to be "yes" on the coverage, you will then get to the question which is called the "bad faith" part of the case. We think you will find that. Please don't leave the Woelfels with nothing in this case. Your "yes" answers to questions 1 and 2 are supported by the evidence in this case.

No contemporaneous objection was made by the defense.

¶15 Homestead contends that counsel's request that the jury not leave the Woelfels with nothing had the prohibited effect of informing the jury of the effect of its verdict. *See* ***Kobelinski v. Milwaukee & Suburban Transp. Corp.***, 56 Wis. 2d 504, 520, 202 N.W.2d 415 (1972); ***Pecor v. Home Indem. Co.***, 234 Wis. 407, 419, 291 N.W. 313 (1940). Homestead forfeited an objection to the statement when it failed to make an objection when the statement was made. ***Kobelinski***, 56 Wis. 2d at 521. Even considering the claim on Homestead's postargument motion for a mistrial,

> it must "affirmatively appear" that the remarks prejudiced the complaining party. We must be convinced that the verdict reflects a result which in all probability would have been more favorable to appellants but for the improper conduct. The test for showing prejudice is most stringent when the trial court has found that the improper argument did not have a prejudicial effect and did not grant a new trial.

Wausau Underwriters v. Dane County, 142 Wis. 2d 315, 329-30, 417 N.W.2d 914 (Ct. App. 1987) (citations omitted).

¶16 The trial court concluded, and we agree, that the jury was well aware that unless they found that an explosion occurred at the dairy and caused the silo to collapse, the Woelfels would recover nothing.[5] The whole trial was about Homestead's denial of the claim because it concluded that there was no explosion at the dairy. Homestead chose not to bifurcate the trial on coverage and bad faith. The jury was informed there could only be bad faith if coverage existed. Counsel's reference in closing argument to needing a "yes" answer on verdict questions one and two only referred to what the jury already knew—if there was no coverage there would be no recovery.[6] Not only was counsel's statement not improper, we are not convinced that the jury's verdict was influenced by it such that Homestead was prejudiced.

¶17 The two remaining issues on appeal are framed by Homestead as whether there was sufficient evidence to submit the bad faith and punitive damages claims to the jury. Where the challenge is to the sufficiency of the evidence to go to the jury in the first place, we must view the evidence in the light most favorable to the party against whom the motion is made and we will not reverse the trial court's determination unless it is clearly wrong. ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 783, 541 N.W.2d 203 (Ct. App. 1995). The clearly wrong standard applies even when the trial court reserves a ruling on

[5] Special verdict question 1 was: "Did an explosion occur on the evening of September 15, 2006, at the plaintiffs' dairy?" Special verdict question 2 was: "Was the explosion a cause of the silo collapse?"

[6] For the first time in its reply brief Homestead contends that counsel's statement in closing argument was inaccurate because the Woelfels had in fact recovered nearly $30,000 for the lost cows. We will not, as a general rule, consider arguments raised for the first time on appeal and for the first time in a reply brief. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154; ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

the motion for a directed verdict during the trial and the motion is renewed after verdict. ***Id.*** at 787-88. Homestead argues that the trial court erred in submitting the bad faith and punitive damages claims to the jury so we apply the clearly wrong standard of review.

¶18 A trial court may not grant a directed verdict "'unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom,' and that there is no credible evidence to support a verdict for the plaintiff." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995) (citation omitted). The trial court "is better positioned to decide the weight and relevancy of the testimony." ***Id.*** For that reason, we must give substantial deference to the trial court's assessment of the evidence. *See* ***id.*** at 389. If there is any credible evidence to support a jury's verdict, the verdict must stand and the trial court is not clearly wrong in having submitted the claims to the jury. *See* ***id.*** at 389-90, 392.

¶19 With respect to the bad faith claim, Homestead contends there can be only one interpretation of the evidence—that the cause of the silo's collapse was "fairly debatable" and therefore Homestead had a reasonable basis for denying coverage. *See* ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 693, 271 N.W.2d 368 (1978) (defining the tort of bad faith). Homestead points to evidence that within one week of the reported loss it had a structural engineer out to the farm and obtained an opinion about the cause of the collapse, that upon the Woelfels' dissatisfaction with the qualifications of that engineer it called a second expert to the site, that it tried to acquire evidence or expert reports the Woelfels had but that information was not provided until eleven months after the collapse, and that Kris Woelfel acknowledged in his trial testimony that reasonable minds could differ on the cause of the collapse. It argues that bad faith cannot be found

even if the insurer conducted a flawed investigation. *See* ***Mills v. Regent Ins. Co.***, 152 Wis. 2d 566, 575-76, 449 N.W.2d 294 (Ct. App. 1989).

¶20 The jury was properly instructed that Homestead could be found to have acted in bad faith if it conducted its investigation in such a way as to prevent it from learning the true facts upon which the claim was based. WIS JI—CIVIL 2761. There was disputed testimony about whether Berens, the first adjuster at the farm, told the Woelfels that there would be no coverage without any investigation at all. The jury was free to believe the Woelfels' version that Berens had simply indicated there would not be coverage for the collapse without even walking into the barn. There was evidence that Homestead's initial visits to the site were cursory and that it failed to talk to persons who heard the event, first responders to the scene who smelled burnt material, or those who dug amongst the rubble and observed burnt material. Even though Tipler returned to the farm for the purpose of observing the debris field, he never pursued an explanation for what he observed. He presented the Woelfels with a "non-waiver agreement," before getting the report from Grocholski, the structural engineer, and that agreement signaled that there was going to be a coverage dispute. Grocholski had information that the silo had been inspected on the day it was filled but simply dismissed the work of the inspector as "primarily equipment oriented." He also relied on the vertical alignment of exposed rebar. Kris Woelfel indicated that Grocholski had no response when Woelfel pointed out that the alignment was due to the rebar being cut to facilitate removal. Johnson, Homestead's second expert, left the scene after discovering some burnt material and did not address it. Further, Homestead was already in the "pre-denial" stage before Johnson even visited the farm. This evidence is sufficient to support the jury's bad faith finding

and, as such, the trial court was not clearly wrong in denying the motion for a directed verdict and submitting the bad faith claim to the jury.

¶21 A question on punitive damages should not be submitted to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite conduct. ***Strenke v. Hogner***, 2005 WI 25, ¶40, 279 Wis. 2d 52, 694 N.W.2d 296. The injured party must show an intentional disregard of the rights of others on the part of the wrongdoer. ***Id.***, ¶27; WIS. STAT. § 895.043(3). "[A] person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded," and if the conduct was sufficiently aggravated to warrant punishment by punitive damages. ***Strenke***, 279 Wis. 2d 52, ¶38. The disregard of the right to a thorough investigation and evaluation of a claim can result in punitive damages. ***Id.***, ¶30. The entitlement to punitive damages must be proven by clear and convincing evidence. ***Id.***, ¶41. Whether the evidence, if believed by the jury, is sufficient to submit punitive damages to the jury presents a question of law which we review de novo. ***Id.***, ¶13.

¶22 Homestead acknowledges that evidence on which punitive damages could be based was: Berens' comments and demeanor, alleged disregard of fire evidence, Tipler's notes suggesting an early and persistent view to deny the claim, and alleged manipulation of experts to confirm reasons for denial. Although Homestead provides a reasonable explanation to counteract that evidence, the jury was not required to accept Homestead's view of the evidence. The competing evidence allowed for the rejection of Homestead's view and permitted the jury to infer the nefarious intent which Homestead disavows. Ultimately we must defer to the jury's assessment of the credibility of witnesses and the weight to be given

their testimony, and must accept the reasonable inferences drawn by the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996).

¶23 There was sufficient evidence from which the jury could conclude that Homestead was aware that its acts were substantially certain to result in the disregard of the Woelfels' right to a thorough investigation and evaluation of the cause of the silo's collapse. The jury could conclude that the immediacy of Homestead's conclusion of the cause was conduct that was sufficiently aggravated to warrant punishment by punitive damages. It was appropriate to submit the punitive damages question to the jury.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.