COURT OF APPEALS DECISION DATED AND FILED

December 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP2432

Cir. Ct. No. 2007CV12848

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

PARK TERRACE, LLC,

PLAINTIFF-RESPONDENT,

V.

TRANSPORTATION INSURANCE COMPANY,

DEFENDANT-APPELLANT,

JOHNSON INSURANCE SERVICES, LLC,

DEFENDANT-RESPONDENT.

APPEAL from judgments of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

¶1 LUNDSTEN, P.J. This appeal involves a builder's risk insurance policy issued by Transportation Insurance Company. The policy covered risks associated with a condominium project that Park Terrace, LLC, was constructing. A fire occurred during construction, and Park Terrace sought to recover under the policy. Transportation paid on Park Terrace's claim for reconstruction costs, but denied Park Terrace's separate claim for loss of income. Park Terrace then brought suit for reformation of the insurance policy, breach of contract, and bad faith. The circuit court ordered reformation and, after a trial, the jury found in favor of Park Terrace and awarded contract, bad faith, and punitive damages. Transportation appeals, complaining that, among other things, the evidence does not support the damages.

¶2 We affirm with regard to the reformation and breach of contract claims. We reverse the bad faith and punitive damages awards and the award of attorneys' fees. We affirm the dismissal of Transportation's cross-claim against defendant-respondent Johnson Insurance Services. We deny Park Terrace's motion requesting remand for an award of additional attorneys' fees and costs associated with this appeal. Accordingly, we affirm in part, reverse in part, and remand for entry of judgment consistent with this opinion.

Background

¶3 Park Terrace sought to develop land along the Milwaukee River into condominiums. To cover risks associated with this project, Park Terrace contacted an insurance agency, Johnson Insurance, seeking insurance for the

project. Johnson, in turn, contacted Transportation Insurance.[1] Transportation subsequently issued a builder's risk policy for the Park Terrace project.

¶4 As pertinent here, the policy included two types of coverage. One type covered direct physical loss. Generally speaking, this provided coverage for reconstruction if a fire or some other calamity damaged the project. A second type of coverage was for loss of income resulting from delays caused by a direct physical loss. This coverage came in the form of a loss of income endorsement included with the policy.

¶5 Subsequently, Park Terrace sought to renew the initial policy, and Transportation issued a renewal. On October 21, 2005, when the renewal policy was in effect, there was a fire at Park Terrace's condominium project. The fire caused major damage to one condominium building, and also caused less severe damage to surrounding project structures. Pursuant to the policy's physical loss coverage, Transportation paid approximately $450,000 to repair the property damage. Transportation also paid approximately $30,000 for other covered costs.

¶6 Park Terrace submitted a claim seeking loss of income caused by the delay from the fire. Transportation, however, denied this claim, asserting that the renewal policy did not include loss of income coverage. Rather, Transportation claimed that the renewal policy only covered "soft costs," which was more limited coverage for items such as interest and taxes.

[1] At times in the record and briefs, the insurer is referred to as CNA. We are told that CNA consists of a group of insurance companies, including Transportation Insurance, the particular insurance company that issued the policies here.

¶7 The following series of events eventually came to light. The renewal policy, as initially issued, contained a loss of income endorsement, just as the first policy had.[2] After the loss, Transportation unilaterally removed the loss of income endorsement from the renewal policy and replaced it with the more limited "soft costs" endorsement. Transportation took the position that the agreed-upon coverage was for this "soft costs" coverage, and not for loss of income coverage, and that the loss of income endorsements in both the first policy and the renewal policy had been included by accident. Park Terrace took the contrary position that the agreed-upon coverage was for loss of income.

¶8 Park Terrace sued Transportation for breach of contract and bad faith, and also sought reformation of the renewal policy to provide loss of income coverage. In addition, Park Terrace sought punitive damages. Park Terrace also named Johnson as a defendant and brought claims against Johnson, but those claims are not at issue in this appeal. Transportation cross-claimed against Johnson for indemnification, alleging that Johnson erred in its role in securing the policies.

¶9 The case went to trial. After the presentation of evidence, but before submitting the case to the jury, the circuit court decided Park Terrace's reformation claim. The court concluded that the policy, as altered by Transportation, should be reformed to include the loss of income endorsement. The case was then submitted to the jury, and the jury returned a verdict finding in

[2] There is an additional complication, but it does not affect our analysis. In the first policy, the income endorsement indicated *business* income coverage, but as originally issued the renewal policy's income endorsement indicated *rental* income coverage. There is no dispute that *rental* income coverage was not the requested coverage. Rather, the parties dispute whether the renewal policy should have included *business* income coverage.

favor of Park Terrace on the contract and bad faith claims. The jury awarded Park Terrace contract damages of $370,000, bad faith damages of $3 million, and punitive damages of $4 million. The circuit court also awarded $1 million in attorneys' fees to Park Terrace as additional bad faith damages.[3] In addition, after the jury found that Johnson was not negligent in procuring the policies, the circuit court dismissed Transportation's cross-claim for indemnification against Johnson. Transportation raised various post-verdict challenges, which the circuit court denied. Transportation appeals.[4]

Discussion

A. Bifurcation

¶10 Prior to trial, Transportation moved to bifurcate the proceedings so that the contract claim would be tried separately from the bad faith claim. The bifurcation motion was filed on December 2, 2009, which was nearly two months after discovery had closed. The circuit court declined to exercise its discretion to bifurcate, citing, among other things, the lateness of the motion. Transportation challenges this decision, primarily relying on ***Dahmen v. American Family Mutual Insurance Co.***, 2001 WI App 198, 247 Wis. 2d 541, 635 N.W.2d 1. We reject Transportation's argument.

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[3] The question of bad faith attorneys' fees was submitted to the jury, and the jury awarded $1 million. However, post-verdict, the circuit court concluded that this was a determination for the court. The court explained that it was independently awarding $1 million in attorneys' fees.

[4] Both Park Terrace and Johnson have submitted responsive briefs. Johnson's brief is limited to the topics of reformation and Transportation's cross-claim for indemnification.

¶11 Bifurcation is a discretionary decision. *See* WIS. STAT. § 805.05(2)[5]; ***Dahmen***, 247 Wis. 2d 541, ¶11. In ***Dahmen***, we reiterated that the factors relevant to bifurcation are "the potential prejudice to the parties, the complexity of the issues, the potential for jury confusion and the issues of convenience, economy and delay." *See* **Dahmen**, 247 Wis. 2d 541, ¶11.

1. Transportation's Argument Relying On **Dahmen**

¶12 In ***Dahmen***, we concluded that a circuit court's failure to bifurcate was an abuse of discretion. *See* ***id.***, ¶20. Transportation argues that this case is comparable to ***Dahmen*** because both cases concern a bifurcation request where there is both an insurance contract claim and a bad faith claim. However, in ***Dahmen***, unlike in this case, we addressed this topic in the context of a request to bifurcate that came *prior* to discovery.

¶13 In ***Dahmen***, the plaintiffs brought two claims, one based on an underinsured motorist claim under their insurance policy and the other a bad faith claim based on denial of the claim. *See* ***id.***, ¶¶1, 5. About a month after the plaintiffs filed suit, the insurance company moved to bifurcate and to stay discovery on the bad faith claim. *See* ***id.***, ¶¶6, 20. The company argued that trying the claims together would be unfairly prejudicial because the plaintiffs could demand privileged information that otherwise would not be discoverable in the absence of the bad faith claim. *See* ***id.***

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

¶14 Our reversal in ***Dahmen*** was based on multiple factors, *see* ***id.***, ¶20, but the focus of our discussion was on the potential for prejudice "rooted in the discovery process." *See* ***id.***, ¶12. We explained that litigation of the bad faith claim would entitle the plaintiffs to "work product and attorney/client material containing information relevant as to how the [plaintiffs'] claim was handled," including the insurance company's "internal determination to deny benefits, its evaluation as to how a jury may value the [plaintiffs'] claim and its approach to settlement." ***Id.***, ¶13. We observed that this "information would not be available to the [plaintiffs] if they were proceeding solely on a claim for [underinsured motorist] benefits." ***Id.***

¶15 Based on these considerations, we observed that there was a possibility that failure to bifurcate could lead to the circumventing of the discovery rule, and concluded that bifurcation was warranted because the insurance company was "entitled to the same discovery protections and privileges enjoyed by other litigants." *See* ***id.***, ¶¶15-16.

¶16 Only after this discovery-focused discussion did we more briefly discuss the other reasons for reversing. This included the possibility that the jury "might not maintain the discipline to discern between the two claims," leading to a "risk for jury confusion and prejudice … [that was] substantial." *See* ***id.***, ¶17. We further explained that bifurcation enhanced judicial economy because bifurcation might render a trial on the bad faith claim unnecessary and because bifurcation encouraged settlement given that "the information gleaned [from discovery on the bad faith claim] might well chill any motivation to settle the underlying claim." *See* ***id.***, ¶19. Transportation's reliance on ***Dahmen*** focuses on this part of our discussion, but treats our lengthy discussion of discovery considerations as unimportant. This approach is flawed. As our summary shows, the pre-discovery

timing of the motion to bifurcate in ***Dahmen*** was important to our decision, and stands in contrast to the situation here.

¶17 As Park Terrace points out, the bifurcation request here came "*after* the entire claims file had been turned over in discovery, *after* discovery had closed, *after* mediation had taken place, and *after* final pretrial reports were filed." Transportation does not refute this.[6] Accordingly, ***Dahmen*** does not require reversal of the circuit court's decision denying Transportation's motion to bifurcate.

¶18 In a letter to this court, Transportation argues that a supreme court opinion issued after briefing in this appeal is instructive. Transportation cites ***Brethorst v. Allstate Property & Casualty Insurance Co.***, 2011 WI 41, 334 Wis. 2d 23, 798 N.W.2d 467, and argues that certain statements in ***Brethorst*** "support[]" Transportation's view that ***Dahmen*** requires bifurcation here. We disagree.

¶19 First, we observe that the factual scenario addressed in ***Brethorst*** is different than the scenario here. ***Brethorst*** addressed issues arising where a plaintiff brought a stand-alone bad faith claim against the plaintiff's insurance company for failure to pay a benefit—there was no companion breach of contract claim. *See* ***Brethorst***, 334 Wis. 2d 23, ¶¶1, 4-5. Thus, it is enough to observe that ***Brethorst*** did not address a situation involving both bad faith and breach of

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[6] Our review of the record suggests that, when Transportation filed the bifurcation motion, there may have been an ongoing dispute regarding some discovery material, but Transportation does not discuss it on appeal. For our purposes, it is sufficient to observe that discovery was closed, and there is no reason to suppose that discovery was not essentially complete.

contract claims, much less a situation where bifurcation was first requested after the close of discovery.

¶20 Second, Transportation points to the following statement in ***Brethorst***:

> The policies articulated in ***Dahmen v. American Family Mutual Insurance Co.***, 2001 WI App 198, 247 Wis. 2d 541, 635 N.W.2d 1, which require bifurcation when both bad faith and breach of contract claims are brought together, are only partially applicable when a party has chosen to plead only a bad faith claim.

Id., ¶5. Transportation asks us to read this sentence as a holding that bifurcation is *always* required when both bad faith and breach of contract claims are brought. This short reference to ***Dahmen***, however, is not properly read as a blanket holding. Rather, it is simply a statement that the policies that supported bifurcation in ***Dahmen*** are only partially applicable in ***Brethorst***. It is not reasonable to read the quote above as stating that a circuit court must always grant bifurcation any time there are both bad faith and breach of contract claims, regardless of the circumstances.

2. Transportation's Remaining Bifurcation Arguments

¶21 We have concluded that Transportation's primary bifurcation argument relying on ***Dahmen*** fails. Transportation also makes assertions directed at the individual bifurcation factors, arguing that those factors warrant reversal. *See* ***Dahmen***, 247 Wis. 2d 541, ¶11 (stating factors). We are not persuaded.

¶22 Transportation asserts that judicial economy weighed in favor of bifurcation, even though, as the circuit court viewed it, the motion to bifurcate came "late" in the context of this case. Transportation specifically contends that

"judicial economy would have been furthered had the phase-one verdict obviated the need for phase two." Even if this were true, however, it is also true that other potential efficiency gains were already lost. For example, Transportation does not dispute that, when it moved for bifurcation, discovery had already closed and final pretrial reports were already filed. Moreover, when focusing on the relative lateness of the motion, the circuit court could reasonably have had in mind the possible risk that inefficiencies would be introduced by shifting gears "late." Transportation does not address this.

¶23 Transportation also asserts, without meaningful explanation, that "the coverage claim might have settled if bad faith had not gone simultaneously to the jury." Lacking more explanation, we find this bald assertion unpersuasive. Further, we note that our discussion of settlement in ***Dahmen*** was in the context of the pre-discovery timing of the bifurcation motion. *See* ***Dahmen***, 247 Wis. 2d 541, ¶19 ("[I]f the [plaintiffs] are permitted to proceed with discovery on the bad faith claim, the information gleaned from such might well chill any motivation to settle the underlying claim.").

¶24 Finally, Transportation makes a non-specific assertion about prejudice. Transportation asserts that "simultaneous adjudication of the coverage claim and the bad-faith claim presented the unacceptable risk that the jury's coverage determination would be improperly colored by Park Terrace's argument that Transportation had acted in bad faith, and *vice versa*." This assertion lacks development. Transportation neither identifies which specific evidence it views as prejudicial nor explains which prejudicial evidence would have been excluded had bifurcation been granted. Further, to the extent that Transportation complains that a failure to bifurcate had an unfair effect on its defense against the bad faith claim, our conclusions below render that concern moot.

¶25 Transportation's arguments, at best, demonstrate that the circuit court could have made a different bifurcation decision—the arguments do not demonstrate that the circuit court misused its discretion.

B. Reformation Of The Contract

¶26 Transportation next argues that the circuit court misused its discretion when reforming the renewal policy to include loss of income coverage. The argument refers to the fact that, after the presentation of evidence, but before submitting the case to the jury, the circuit court reformed the renewal policy (i.e., the policy as altered by Transportation to provide "soft costs" coverage) to instead provide loss of income coverage. The result was that the renewal policy stated the same coverage as the first policy. We reject Transportation's argument.

¶27 Generally speaking, "[a] cause of action for reformation of an insurance policy is allowed when the one seeking reformation shows that because of fraud or mutual mistake, the policy does not contain provisions desired and intended to be included." ***Sprangers v. Greatway Ins. Co.***, 175 Wis. 2d 60, 70, 498 N.W.2d 858 (Ct. App. 1993). The parties agree that the reformation was a discretionary decision for the circuit court. *See* ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 847 n.8, 593 N.W.2d 103 (Ct. App. 1999) (stating that the erroneous exercise of discretion standard has been applied to reformation of insurance policies). Circuit court fact finding that underlies a discretionary decision is reviewed under a clearly erroneous standard. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996).

¶28 Transportation's argument has a flawed starting point. It assumes that we may accept Transportation's version of contested facts, even though the circuit court rejected that version. That is, Transportation asserts, as if it is

undisputed, that Park Terrace agreed all along to the more limited soft costs endorsement, and not to the loss of income endorsement. For example, Transportation asserts that Park Terrace "knowingly contracted only for 'soft costs' coverage" and that "Transportation offered to insure builder's risk with 'soft costs,' and Park Terrace accepted." Transportation then premises its legal arguments on these and similar assertions.

¶29 The circuit court, however, plainly rejected Transportation's version of events and instead credited contrary evidence. For example, the circuit court expressly credited testimony from a Johnson Insurance employee, Matthew Mekemson, who was involved in securing the policies at issue. Mekemson testified that a Park Terrace representative told Mekemson that Park Terrace wanted policies to protect for "lost profits" and that Mekemson communicated this to Transportation. Mekemson testified that, when seeking the initial policy from Transportation, he "stress[ed] ... the business income portion" of the coverage. Mekemson further stated that he believed that Transportation's underwriter "knew exactly what we were looking for and she was going to provide that." The court also credited other testimony indicating that it would have been illogical, having initially agreed to loss of income coverage, to remove that coverage when simply renewing coverage, and that the typical practice would have been for an insurer to expressly communicate that it was declining to provide the loss of income coverage if that had been Transportation's intent.

¶30 When crediting Mekemson's testimony and the related testimony, the circuit court necessarily rejected Transportation's view that Transportation "offered to insure builder's risk with 'soft costs,' and Park Terrace accepted" and that the inclusion of the loss of income endorsements in the policies was merely an oversight by Transportation. Transportation does not attempt to persuade us that

the circuit court's findings on this topic are clearly erroneous. Accordingly, we discuss the reformation topic no further.

C. Sufficiency Of The Evidence Supporting Contract Damages Award

¶31 Transportation next contends that there was insufficient evidence supporting the jury's contract damages award of $370,000. Transportation's attack on the contract damages award is not, however, backed by a viable argument.

¶32 When reviewing the sufficiency of the evidence, we will uphold a jury's verdict if there is any credible evidence that supports it, even if that evidence is contradicted and the contradictory evidence is more convincing. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶¶38-39, 235 Wis. 2d 325, 611 N.W.2d 659. We analyze the evidence "in the context of the instructions given to the jury." *See* **Kovalic v. DEC Int'l, Inc.**, 161 Wis. 2d 863, 873 n.7, 469 N.W.2d 224 (Ct. App. 1991).

¶33 As we explain below, Transportation's sufficiency of the evidence argument is fatally flawed because it does not measure the trial evidence against the proof required under the jury instructions.

¶34 As pertinent here, the special verdict asked: "Did Transportation Insurance Company breach the contract of insurance with Park Terrace, LLC?" The related damages question then asked: "What sum of money would fairly and reasonably compensate Park Terrace for its loss of business income up until the time the property should have been rebuilt, repaired or replaced?" The jury instructions did not further limit this question, but rather generally explained:

> The law requires that a person who has been damaged by a breach of contract shall be fairly and reasonably compensated [for] his or her loss. In determining the damages, if any, you will allow an amount that will reasonably compensate the injured person for all losses that are the natural and probable consequences of the breach.

Thus, the instructions are silent regarding a starting date for the lost income time period. Transportation does not address this aspect of the instructions or verdict question.

¶35 Rather than compare the evidence with these jury instructions, Transportation compares the evidence with Transportation's interpretation of the insurance policy. That is, Transportation begins its argument with a citation to the policy and a statement about what the "coverage … is limited to," and then proceeds to address whether the trial evidence is sufficient compared with that asserted limit from the policy.

¶36 For example, Transportation points to policy language as stating that the coverage period begins on "the date that the described project would have been completed" without a fire and ending on the completion of repairs from the fire. This is a different time period than the one described in the jury instructions. Transportation then proceeds to argue that the evidence was insufficient to prove the date the project would have been completed, a date that was not a part of the lost income question posed to the jury. Transportation provides us with no explanation addressing this mismatch.

¶37 Thus, Transportation's sufficiency argument is a non-starter—it does not measure sufficiency of the evidence in light of the jury instructions actually "given to the jury." *See **id.*** at 873 n.7. We decline to develop an alternative

theory for Transportation and, therefore, are left with nothing more that requires our response.[7]

¶38 In what appears to be a somewhat different argument, Transportation, again referring to the policy, asserts that the evidence does not support losses "due to a delay" caused by the fire. Transportation argues that "any nexus between any delay allegedly caused by the fire and any claimed loss of income" was broken by "the intervening housing downturn." Stated differently, Transportation contends that the evidence supports a finding that Park Terrace's lost income was caused by the soured market for condos, not by the construction delay related to the fire. Transportation does not, however, meaningfully develop this argument. In particular, Transportation does not explain why this is the only reasonable view of the evidence. Although it is obviously true that a downturn in the condo market could have contributed to Park Terrace's loss of income, a developed argument on this topic would necessarily have involved the discussion of evidence regarding the precise timing and severity of the downturn as it pertained to the condo market in downtown Milwaukee. Transportation provides no such discussion. We address this argument no further.

D. Bad Faith

¶39 Transportation challenges the sufficiency of the evidence supporting the jury's $3 million bad faith damages verdict. First, Transportation argues that there was insufficient evidence that Transportation committed acts that constitute

[7] In a footnote, Transportation asserts that it requested that the circuit court give a different jury instruction. Transportation, however, does not argue that a flawed jury instruction warrants reversal.

bad faith. Second, Transportation argues that, even if there were evidence supporting bad faith acts, the evidence does not support a finding that its bad faith acts *caused* damages. Because we agree with Transportation's argument directed at causation, we need not address whether the evidence was sufficient to support the jury's bad faith finding.

¶40 Park Terrace, for its part, argues that there was evidence showing that Transportation's bad faith failure to pay the loss of income claim caused Park Terrace to suffer additional losses. However, as further explained below, when actually discussing the evidence, Park Terrace points to evidence showing that losses flowed from the fire, not evidence showing that losses flowed from Transportation's failure to pay Park Terrace for lost income.

¶41 In the subsections below, we address the reasoning employed by the circuit court and the evidence that Park Terrace points to. We then explain why we agree with Transportation that our reversal of the damages flowing from Transportation's bad faith also requires reversal of the attorneys' fees and punitive damages in this case. We first briefly state the applicable law.

¶42 A party is entitled to bad faith damages that are "the proximate result of the insurer's bad faith." ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶37, 249 Wis. 2d 623, 638 N.W.2d 575. In evaluating the sufficiency of the evidence for a tort damage award, the "fact of damages" must be established to a degree of "'reasonable, not absolute, certainty.'" *See* ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶¶63-64, 314 Wis. 2d 560, 757 N.W.2d 803 (citation omitted). We uphold a jury verdict if there is any credible evidence to support it. ***Morden***, 235 Wis. 2d 325, ¶38.

1. The Circuit Court's Reasoning

¶43 The circuit court rejected Transportation's post-verdict motion challenging the sufficiency of the evidence to support the damages. We find the circuit court's reasoning to be lacking because at least in part the reasoning relies on an incorrect premise, and because the court provides no meaningful assessment of the evidence. We reproduce the court's comments on this topic in their entirety:

> Park Terrace proved compensatory damages []proximately caused by Transportation's bad faith. Park Terrace did not need to provide this number with absolute certainty, just reasonable certainty. Mathematical precision is not required. In this case there was plenty of credible testimony and evidence presented as to the negative effect the fire had on the project. The number the jury came up with as bad faith damages was not unreasonable in light of that credible testimony and evidence. The Court agrees with Park Terrace that the facts of this case are exactly the type of scenario that supports the law allowing for extra contractual damages when bad faith by an insurance company occurs. Failure to properly and timely pay claims creates its own unique damages for an insured, just as occurred here.

¶44 We first observe that the circuit court's reasoning includes an incorrect consideration. The court observes, as if it matters *to damages caused by bad faith*, that "[i]n this case there was plenty of credible testimony and evidence presented as to *the negative effect the fire had on the project*," and that the damages figure was not unreasonable "in light of *that* … testimony and evidence" (emphasis added). However, the question is not whether the fire caused damages—rather, the question is whether Transportation's failure to cover lost income caused damages. Accordingly, at least in part, the circuit court appears to have based its decision on the wrong inquiry.

¶45 Second, the remainder of the court's comments do not provide a basis for affirming the bad faith damages verdict. To the extent the court at some point seems to identify the correct inquiry—whether the bad faith failure caused losses—the court's comments are vague. For example, the court vaguely states that "[f]ailure to properly and timely pay claims creates its own unique damages for an insured, just as occurred here," but the court does not then go on to discuss the evidence. Accordingly, we find no meaningful assessment of the evidence that might merit deference. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388-89, 541 N.W.2d 753 (1995) ("Because a circuit court is better positioned to decide the weight and relevancy of the testimony, an appellate court 'must also give substantial deference to the trial court's better ability to assess the evidence.'" (citation omitted)).

2. Park Terrace's Arguments Directed At Bad Faith Damages

¶46 It is undisputed that Transportation timely provided coverage for fire damage, enabling Park Terrace to remedy damage caused by the fire. And, so far as we can discern from Park Terrace's arguments, nothing Transportation did or did not do delayed the project. The question here is whether there is evidence supporting a reasonable inference that Transportation's failure to pay Park Terrace $370,000 for lost income caused additional losses. Park Terrace relies on three sources of testimony, and asserts that the testimony shows that Transportation's "delayed payment was … a deal killer" that resulted in losses. As we explain, two of these sources address whether the fire caused losses, and the third does not address losses at all. More to the point, none of the three sources address whether Transportation's failure to pay lost income caused additional losses.

¶47 First, Park Terrace points to testimony from Park Terrace's accounting expert, Steven Rozansky. Rozansky testified about estimated financial losses to Park Terrace stemming from the fire. More specifically, Rozansky opined about "what [Park Terrace] expected to get [financially] had there not been a fire." Rozansky presented three estimates, but Park Terrace focuses on one in particular. That estimate compared Park Terrace's expected profits "without the fire" with the actual financial return "because of the fire." Rozansky opined that the difference between these two figures was $3.1 million and that this represented Park Terrace's "real loss" due to the fire. He also offered two other estimates that were focused on the effect of the fire on Park Terrace's "expenses."

¶48 Park Terrace also points to a report authored by Rozansky and introduced into evidence. Consistent with Rozansky's testimony, the report explains that Rozansky's financial estimates are "calculations of damages *resulting from the October 21, 2005 fire*" (emphasis added). Typical of the report's explanation of the losses is the following statement:

> The fire has caused delays in construction, followed by a change in the rapid sales climate that existed prior to the fire, and has pushed the project into a period of much softer condominium sales which has been confirmed by the real estate professionals that are marketing these units.

¶49 Second, Park Terrace points to a place in the record where Rick Barrett, an investor and partner in the Park Terrace project, is questioned by one of Park Terrace's attorneys. Park Terrace merely draws our attention to two short statements from Barrett: (1) that "time kills all deals" and (2) that "[t]ime is the most valuable thing you have when it comes to construction." We provide the following context for these statements:

> [Attorney]: Is there a reason why, for a development project like condominiums, delay would be a problem?
>
> [Barrett]: Well, in the condominium or real estate realm, time kills all deals. So, I mean it's something that we understand, and time is of the essence and very, very important to get … back up and running at full speed.
>
> [Attorney]: Was that true before the fire?
>
> [Barrett]: Absolutely.
>
> [Attorney]: What do you mean by time kills all deals?
>
> [Barrett]: Time is the most valuable thing you have when it comes to construction. If you can build fast and you can move product and you have momentum, that's where you can make income. The same can be said if you get into a situation where your construction gets stopped. It's almost … exponentially important to get back on as fast as you possibly can.[8]

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[8] Although not relied on by Park Terrace, for the sake of completeness we also note statements from Barrett that came immediately after the statements we have quoted in the above text:

> [Attorney]: Why [is it important to get back on as fast as you possibly can]?
>
> [Barrett]: There's so many different things that can change people's perception of the project, and it's very, very important if you're going to keep the sales momentum, as we had in this particular project, we had a solid momentum moving forward. And having been through it, we realized that the window of opportunity to get [the Park Terrace] project back up and running and get those units moved out as best we can, *we needed to resolve our issue with the insurance company and move this project into construction again.*
>
> [Attorney]: Did the fire cause delays?
>
> [Barrett]: The fire was a huge delay.

(Emphasis added.) In context, it is apparent that Barrett's statement that "we needed to resolve our issue with the insurance company" was not a statement that Transportation's failure to pay

(continued)

¶50 Third, Park Terrace points to testimony from Kelly Denk, a managing member of Park Terrace, where Denk is asked questions by an attorney for Park Terrace. Park Terrace merely draws our attention to Denk's assertion that dealing with Transportation was "[p]ainful." Again, we provide the context:

> [Attorney]: Did you handle the claim [submitted to Transportation] throughout?
>
> [Denk]: Yes.
>
> [Attorney]: As far as division of labor, that was you?
>
> [Denk]: Primarily me.
>
> [Attorney]: ... How did it go? How has it been for your handling of the claim?
>
> [Denk]: Painful. I mean, compared to how they adjusted the property damage claim … it was a night-and-day difference.

¶51 Thus, the evidence Park Terrace relies on is directed at the question whether the fire and attendant delays caused losses and at the "handling" of the claim being "[p]ainful." None of this evidence addresses whether the failure of Transportation to provide coverage for lost income caused additional losses.

¶52 In addition to what we have addressed above, Park Terrace makes a different assertion about bad faith damages. Park Terrace asserts that, as a result of Transportation's failure to cover lost income, "Park Terrace was forced to retain a public adjuster to help it with the process" and "Park Terrace also had to pay three expert witnesses who testified at trial." These assertions fall far short of a

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the income claim in fact delayed the project. Rather, the only delay that Barrett points to in this testimony is the delay from the fire.

developed argument. Park Terrace provides no explanation as to what evidence would support a jury finding regarding the amount of these expenses or even that these expenses flowed from Transportation's failure to pay.[9] Notably, our review does not reveal any place in the record where Park Terrace argued to the jury that these items support bad faith damages.

¶53 Finally, we observe that Park Terrace's argument regarding the $3 million in bad faith damages is limited to its attempt to persuade us that the entire award should be affirmed. Park Terrace makes nothing resembling a developed alternative argument that might support affirming a lesser award. In particular, Park Terrace does not suggest that we may or should reduce the damages or that we may or should remand to the circuit court for further proceedings. We do not mean to suggest that such an effort would have been successful. Rather, we are simply explaining why we have not explored and addressed the topic.

¶54 To summarize, we conclude that Park Terrace provides no basis on which we might uphold the jury's bad faith damages award. Accordingly, we vacate that award.

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[9] Park Terrace provides record cites, but our review of these record cites does not assist Park Terrace. One cite seemingly serves to show that the public adjuster was not paid by Park Terrace because the adjuster could not resolve the claim. Another record cite does not, so far as we can discern, refer to a page that exists in the record before us. The remaining two places cited by Park Terrace are merely statements by two experts at the beginning of their testimony where the experts explained their hourly fees. In the testimony cited, there is no reference to the pertinent connection between Transportation's failure to pay lost income and losses incurred by Park Terrace.

3. Remaining Damages Considerations

¶55 Transportation contends in its brief-in-chief that, if we conclude that the jury's bad faith damages award must be vacated, it follows that we should vacate the $1 million in bad faith attorneys' fees and the $4 million in punitive damages. In its responsive brief, Park Terrace does not dispute this proposition, thereby effectively conceding the point. This concession is appropriate.

¶56 The circuit court awarded Park Terrace $1 million in attorneys' fees as an additional bad faith damage, relying on ***Roehl Transport, Inc. v. Liberty Mutual Insurance Co.***, 2010 WI 49, ¶170, 325 Wis. 2d 56, 784 N.W.2d 542 (stating that "the successful complainant in a bad faith action is entitled to an award of attorney fees as compensatory damages, and that the circuit court is in a position to determine the amount of the award"). It is undisputed that Park Terrace's attorneys' fees are on a contingency fee basis, and the circuit court based its award on this contingency fee arrangement. Specifically, the circuit court awarded the $1 million bad faith attorneys' fees based on the contingency fee of one-third of the $3 million bad faith jury award. Given our conclusion that the evidence is insufficient to support the $3 million award, the attorneys' fees award also necessarily falls. Accordingly, we vacate the attorneys' fees.[10]

¶57 As to punitive damages, our supreme court has explained that a "plaintiff is entitled to punitive damages only if the jury awards him compensatory damages on his bad faith claim," and that "punitive damages [are not] available as

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[10] Park Terrace does not argue for attorneys' fees based on any other calculation, including a calculation relating to the breach of contract damages. Accordingly, we do not address the topic.

a remedy for breach of contract actions." ***Weiss***, 197 Wis. 2d at 393. Given our above conclusions, there are no remaining bad faith compensatory damages that might support punitive damages. Rather, the only remaining damages of $370,000 are breach of contract damages. Consistent with the parties' assertions and concessions, we reverse the $4 million in punitive damages.

E. Cross-Claim For Indemnification

¶58 Transportation asserts that the circuit court erred when it dismissed Transportation's cross-claim for indemnification against Johnson based on an agency agreement. That agreement required Johnson to indemnify Transportation for liability "caused by [Johnson's] error or omission." The circuit court dismissed the cross-claim after the jury returned its verdict finding that Johnson was not negligent with regard to procuring the policies. Transportation's argument is that dismissal of its cross-claim based on a finding of no negligence is not proper because Johnson's "error" under the agreement need not be negligent to trigger indemnification.

¶59 In its responsive brief, Johnson asserts that Transportation raises this argument for the first time on appeal and, accordingly, that it is forfeited. Specifically, Johnson contends: "[T]here was no argument raised at the time of the motions at the close of evidence or after verdict that there was some distinction between … the absence of the finding of 'negligence' on the part of Johnson and the terms 'error' or 'omission' as used in the Agency Agreement." In reply, Transportation does not respond to this forfeiture argument. Accordingly, we deem Transportation to have conceded that its argument is forfeited, and we do not address it. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1

n.1, 256 Wis. 2d 848, 650 N.W.2d 75 (an argument asserted by the respondent and not disputed in the reply brief is taken as admitted).

F. Motion For Additional Attorneys' Fees And Costs

¶60 Park Terrace has submitted a motion requesting remand for an award of additional attorneys' fees and costs associated with this appeal. Park Terrace's apparent premise is that it should be entitled to additional attorneys' fees flowing from the bad faith. To this end, Park Terrace states in its motion that we should remand for additional attorneys' fees *if* we affirm the jury's "finding of bad faith." We have concluded that the jury's finding of bad faith damages cannot be upheld. Park Terrace's motion does not suggest any reason why a remand for purposes of assessing additional attorneys' fees and costs would make sense in light of our conclusions above. Accordingly, we deny the motion.

Conclusion

¶61 For the reasons discussed, we affirm the circuit court with regard to the reformation and breach of contract claims. We reverse the bad faith and punitive damages awards and the award of attorneys' fees. We affirm the court's dismissal of Transportation's cross-claim against Johnson. We deny Park Terrace's motion requesting remand for an award of additional attorneys' fees and costs associated with this appeal. We remand so that the circuit court may enter a judgment consistent with this opinion.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.