SUPREME COURT OF WISCONSIN

Robert L. Kimble and Judith W. Kimble,
Plaintiffs,

v. Appeal No. 2011AP001514

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-Petitioner.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

On Petition for Review of the Decision of the Court of Appeals, District 4

On Appeal from the Judgment and Order of the Door County Circuit Court Case No. 2009CV188, The Honorable D. Todd Ehlers, Presiding

J. Bushnell Nielsen
WI State Bar ID No. 1014758
Rebecca Leair
WI State Bar ID No. 1003955
Reinhart Boerner Van Deuren s.c.
N16 W23250 Stone Ridge Drive, Ste. 1
Waukesha, WI 53188

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265
Telephone: 262-951-4500
Facsimile: 262-951-4690
Attorneys for Defendant-Appellant-Petitioner First American Title Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the $1,000,000 punitive damages award against First American Title Insurance Company violates the Wisconsin Constitution or the common law of the State of Wisconsin.

Circuit court answered: The circuit court rejected First American's constitutional challenge by deferring to the jury and the appeal it anticipated.

Court of appeals answered: The court of appeals considered First American's argument on constitutionality to be insufficiently developed and declined to review it.

STATEMENT OF THE CASE

I. Procedural History

Robert and Judith Kimble (the "Kimbles") filed this action to declare a prescriptive easement over land owned by their neighbor, Land Concepts, Inc. (R.1, 11) They sued their sellers, Dorene Dempster and Mark Herrell, and *their* sellers, John and Jane Stevenson (the "Stevensons"), for breach of warranty. The Kimbles sued their title insurer, First American Title Insurance Company ("First American"), for breach of contract. (R.11)

The owner parties settled, but excluded First American from the settlement. (App. 58, 94-116, R.35, Ex. 3, p. 25, R.35:16-46) The Kimbles assigned their claims against First American to the Stevensons. The Stevensons filed a cross-claim against First American for breach of contract, bad faith and breach of fiduciary duty. (R.25) First American filed a summary judgment motion, which the court denied. (R.31, 32, 42) The dispute was over whether there had been access to the Kimble property before the Stevensons bought an easement for the Kimbles

and from Land Concepts as part of the settlement. The case proceeded to trial.

The first day of the three-day trial was to the court. On First American's motion in limine, and without requiring the Stevensons to present any evidence, the circuit court ruled that title was unmarketable because of a threat to cut off the use of a driveway, which invoked policy coverage. (App. 70-81, R.120:136-46) The jury trial lasted two days, resulting in a verdict finding that First American had denied the Kimbles' claim in bad faith. The jury awarded $50,000 in compensatory and $1,000,000 in punitive damages. (App. 48-49, R.83)

On motions after verdict, the court reduced compensatory damages to $29,738.49, but left the punitive damage award. (App. 82-93, R.123:1, 10-12, 19-20, 27-32) It entered judgment in favor of the Stevensons against First American for $1,029,738.49. (App. 45-47, R.99)

First American appealed. (R. 104) The court of appeals affirmed the judgment in its entirety. *See Kimble v. Land Concepts, Inc.*, No. 2011AP1514, 2012 WL 4815574 (Wis. Ct. App. Oct 11, 2012 (unpublished))

unpublished slip op. Wis. Ct. App. (Oct. 11, 2012) (App. 21-37) ("*Kimble I*"). First American filed a motion for reconsideration. (App. 38-44) On December 3, 2012, the Court of Appeals issued an Errata Sheet with a revised decision and, that same date, an order denying the motion. *See Kimble v. Land Concepts, Inc.*, No. 2011AP1514, Wis. Ct. App. (Dec. 3, 2012) (App. 1-20) ("*Kimble II*").

II. Statement of Facts

The Kimbles own Lot 2 of Certified Survey Map 1362 in the Town of Nasewaupee, Door County (the "Property"). (R.85, Ex. 28.) The nearest major road is County Highway M. (*See* App. 57, R.85, Ex. 50) The land immediately to the north is the Stevensons' Lot 1 of CSM 1362. (App. 61-62, R.85, Ex. 47) The Stevensons created the CSM to split their parcel into two lots. The land to the south and west of those parcels is owned by Land Concepts. (*Id.*)

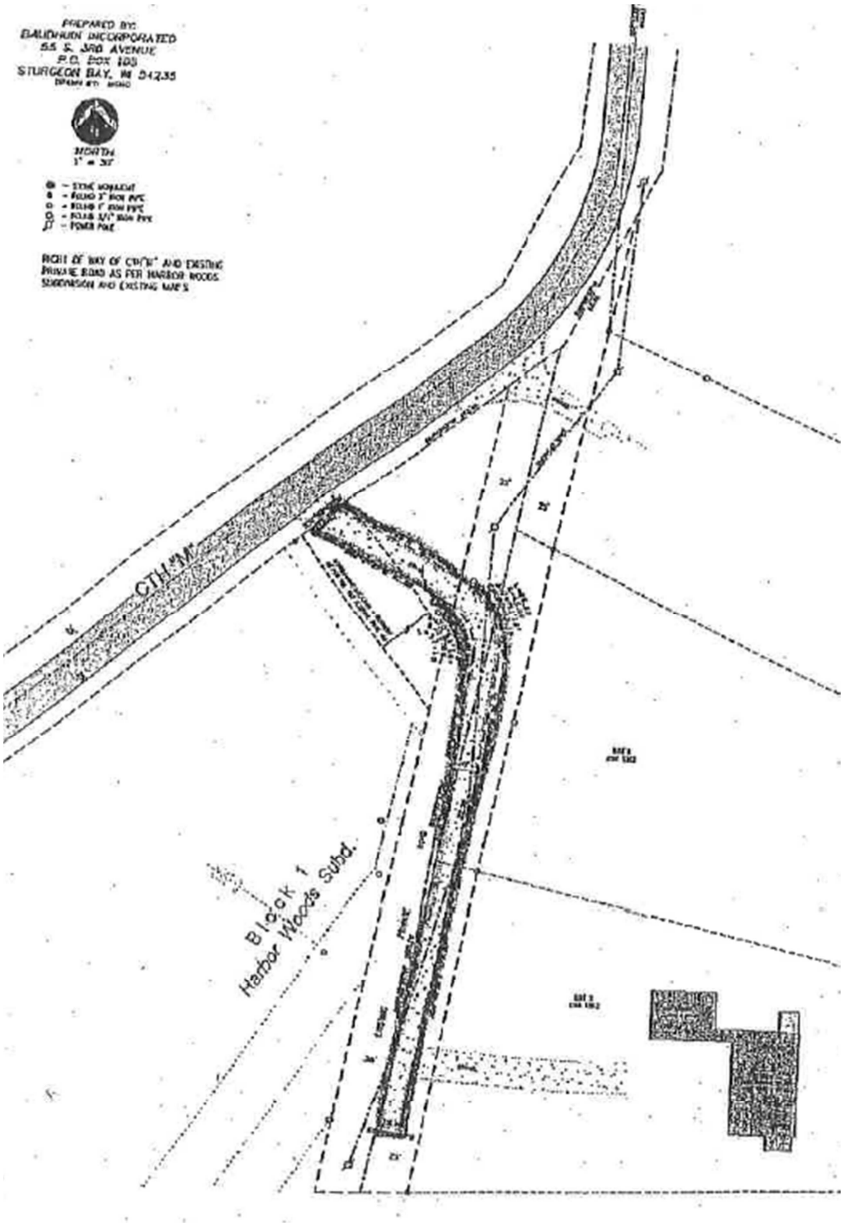
A private drive was established decades ago, running north to Highway M. (App. 59, R.85, Ex. 48) A 1955 survey filed by Cook with the register of deeds shows this driveway as access to a number of parcels, including the

Property. (App. 59, R.85, Ex. 48; R.85, Ex. 103) Easements for use of the north driveway were granted to Abner and Gertrude Anderson in two deeds given in 1956 and 1959 (the "North Easement"). (R.85, Exs. 101, 102)

In 1988 and 1989, Land Concepts recorded an easement across its land to the west leading to Highway M (the "West Easement"). (App. 60, R.85, Ex. 2; R.85 Ex. 1) When the Stevensons sold Lot 2 to Dempster and Herrell, they warranted the North Easement and the West Easement. (R.85, Ex. 25) The deed from Dempster and Herrell to the Kimbles warranted the North and West Easements. (R.85, Ex. 28)

Someone built a driveway going west to County M, which the Stevensons and Kimbles use. This so-called cutoff road was not within the boundaries of either easement grant. The relationship between the cutoff road, the West Easement and the North Easement is clearly shown on Exhibit 9 to the Kimble complaint (R.1:17),[1] a portion of which is reproduced below:

[1] The different paths may also be seen by comparing the North Easement at R.1:15 and R.85, Ex.48 to the survey of the new cutoff road easement at R.1:17 and R.85, Ex.50.



The Kimble house and garage are the dark boxes on the bottom right. A dedicated road, Idlewild Woods Drive, is shown as merging from the south. (R.85, Ex.45) That road connects to Highway M and was dedicated in the plat of Harbor Woods Subdivision. (R.85, Ex. 45; R.120:115-16)

First American issued a title insurance policy (the "Policy") to the Kimbles. (App. 50-56, R.85, Ex. 43) Covered Risk 4 of the Policy indemnifies against a "[l]ack of a right of access to and from the Land." However, the Policy does not insure that access is by a particular route, or affirmatively insure the easements or the right to use the cutoff road. (App. 50-56, R.85, Ex. 43)

Land Concepts owns the land to the west over which the cutoff road is built. Years ago, the Land Concepts partners wanted to purchase and develop the Stevenson and Kimble lots and were miffed when the Anderson estate sold to the Stevensons instead. (R.121:251) John Mendonca and Roger Johnson of Land Concepts harassed the Stevensons in the 1990s, challenging the West Easement among other things. (R.121:251, 238-41, 278) The Stevensons consulted an attorney, who opined that the West Easement was valid. (R.121:279-81, 288-90, 292-93)

When the Kimble for sale sign went up in 2008, Roger Johnson of Land Concepts wrote their real estate agent, claiming that the cutoff road crossing his land trespassed. (R.121:174; R.85, Ex. 108) It was true that the

cutoff road was outside the path of any easement. (R. 11, Ex. 9; R.85, Ex. 56, p. 11; App. 57, R.85, Ex. 50)

Johnson never blocked access to the Property, and the Kimbles were not prevented from using the cutoff road. (R.121:183, 217.; R.121:229-31) Johnson did not sue the Kimbles for trespass or to void the West Easement. (R.120:125-26)

In June, 2009, the Kimbles sued Land Concepts, asking the court to declare their rights in the cutoff road and the North Easement. (R.1) In January 2010, after the Kimbles added First American and others to the suit, they asked First American to contribute $15,000 toward a $50,000 pool to buy an easement for the cutoff road from Land Concepts. (R.122:207-10)

The case was settled between all parties except First American. The Stevensons paid Land Concepts $40,000 for an easement over the cutoff road for the benefit of the Stevenson and Kimble parcels. (App. 94-116, 58, R.35:16-46; R.121:202, 209) The Stevensons also paid the Kimbles $10,000 for an assignment of the Kimbles' claims against First American. The Kimbles released all parties except

First American from any liability. (App. 96, 105-10, R.35:18, 28-33) First American was not informed in advance of the settlement. (R.85, Ex. 129, pp. 14-16)

III. The Jury's Punitive Damage Award Violated the Due Process Clause of the Wisconsin Constitution

To date, First American has been denied its constitutional rights because the punitive damage award is excessive and thus violates its due process rights under Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution.[2] The punitive damage award has received no review by a court to determine if it is excessive and violates First American's Constitutional rights.

A. Constitutional Limits on Punitive Damage Awards

This Court has long recognized that the Due Process Clause of the Wisconsin and federal constitutions impose

---

[2] The order granting this petition limited review to the question of a violation of the Wisconsin Constitution or the common law of the State of Wisconsin. In *County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373, 588 N.W.2d 236 (1999), this Court declined to distinguish the procedural due process requirements of the two constitutions. Id. at 393. The court went on to say that, although the language used is not identical, it has found the two "provide identical procedural due process protections." *Id.* at 393. It said that on more than a "few occasions," it has held that "the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same." *Id.* It quoted a 1965 case saying that, although section 1 of article I is framed as a declaration of rights and is "reminiscent of the Declaration of Independence," it has many times been held to be the equivalent of the Fourteenth Amendment, although noting, further on, that the idea was "more happily" expressed in the Fourteenth Amendment. *Id.* at 393-94 (quoting *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 49-50, 132 N.W.2d 249 (1965)). First American believes that the due process rights afforded under the two constitutions are the same as to this dispute.

"substantive limits on the size of punitive damage awards." *Trinity Evangelical Lutheran Church & Sch. - Freistadt v. Tower Ins. Co.,* 2003 WI 46, ¶¶ 5, 49, 261 Wis. 2d 333, 661 N.W.2d 789; *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 193, 557 N.W.2d 67 (1996).

This limit exists because "[a] general concer[n] of reasonableness … properly enter[s] into the constitutional calculus." *Management Computer Serv.*, 206 Wis. 2d at 193 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993)).

B. The Necessity of a De Novo Review

A reviewing court must conduct a de novo review when a defendant contends that a punitive damage award is excessive and thus violates its due process rights. *Trinity*, 2003 WI 46, ¶ 48. There are several reasons why the reviewing court must review the entire record. First, terms such as "gross excessiveness" are fluid concepts "that take their substantive content from the particular context in which the standard is being assessed." *Id.* at ¶¶ 5, 48, quoting from *Cooper Industries, Inc. v. Leatherman Tool*

Group, Inc., 532 U.S. 424, 431 (2001). Also, independent review is necessary "if appellate courts are to maintain control of, and clarify, the legal principles." *Id.* Further, an independent review of the record "also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Trinity*, 2003 WI 46, ¶¶ 47-48, citing *Cooper*, 532 U.S. at 431; also, *State v. Garfoot*, 207 Wis. 2d 214, 235, 558 N.W.2d 626 (1997) (Abrahamson, C.J., concurring.).

C. The Trial Court Must Perform a "Meaningful and Adequate" Review of a Punitive Damage Award

The trial court must conduct a review of a punitive damage award, based on the legal standards issued by this Court that provide "reasonable constraints" within which the trial court's "discretion is exercised." The application of these standards assures "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," and permit "appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific*

Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 20-21 (1991) (Kennedy, J., concurring), quoted in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring). This is because "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities". *Haslip,* 499 U.S. at 18.

In conducting its review of the record, the court construes the evidence viewed in the light most favorable to the verdict. *Trinity*, 2003 WI 46, ¶ 55. A punitive damage award will not be disturbed "unless the verdict is so clearly excessive as to indicate passion and prejudice." *Id.*, ¶ 56.

Notwithstanding this limited deference to the jury, the trial court reviews the punitive damage award to determine if it is excessive, based on the standards promulgated by this Court. If the court determines that it is excessive, it is required to strike the award or reduce it to the appropriate amount. *Management Computer Servs.,* 206 Wis. 2d at 194; *Tucker v. Marcus*, 142 Wis. 2d 425, 446-47, 418 N.W.2d (1988); *Fahrenberg v. Tengel*, 96 Wis. 2d 211, 291 N.W.2d 516 (1980).

If the trial court conducts a review but "fails to analyze the evidence or set forth the reasons supporting its decision, the reviewing court should give no deference to the circuit court's decision." Instead, in such a case, the reviewing court must examine the record ab initio to determine whether the jury award is excessive, and if so, what amount of damages is reasonable. *Management Computer Servs,* 206 Wis. 2d at 191-92; *Carlson & Erickson Builders*, *Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 669, 529 N.W.2d 905 (1995); *Fahrenberg*, 96 Wis. 2d at 230.

D. In This Case, the Trial Court Refused to Conduct Any Review of the Punitive Damage Award

Judge Ehlers conducted no review of the punitive damage award. First American filed a lengthy and well-reasoned brief in support of its motions after verdict, focused primarily on the excessiveness of the punitive damage award. (R.90) Judge Ehlers' ruling about the punitive damage award was cursory and circular:

> Clearly, this jury believed that Mr. Schenker acted unreasonably [and] with an indifference or reckless disregard of the Kimbles' rights, and

> they sent a message, and I am not disturbing the verdict award. You know, Counsel have not presented me with any case law that says, "Well, it can only be 25 times the compensatory damage verdict, et cetera." … You know, I expect this case is going to be appealed by my upholding this million dollar verdict, so counsel will figure that all out when they get the transcript… . And, you know, we're dealing with a home that was valued, if I'm not mistaken, of over a million dollars. I have no problem. … I'm not going to substitute my judgment for the—for the jurors.

(App. 89-90, R.123:28-29) Judge Ehlers refused to acknowledge that double-digit ratios are automatically suspect. He impliedly found that the jurors *had* acted with prejudice and passion. He nonetheless refused to assess amount of the award based on the test provided by this Court.

The only factor to which the trial judge even alluded was the ratio of compensatory to punitive damages. He reduced the compensatory award by 40%, increasing that ratio from 20:1 to 33:1, but still refused to disturb the punitive award. The only number he suggested that would support the punitive damage award was the value of the Kimble home. Not even the Stevensons, however, had suggested that the value of the property itself represented

the amount of "the harm likely to result from the defendant's conduct." *TXO Prod. Corp.*, 509 U.S. at 460 (citation omitted). Thus, the trial court made no finding to support the 33:1 ratio between compensatory and punitive damages.

A trial court may not shirk its duty on the assumption that an unconstitutional award will be appealed. This Court should give no deference to the circuit court's rulings, because it failed to review the constitutionality of the award.

E. The Court of Appeals Also Failed to Conduct an Independent Review of the Punitive Damage Award

The appeals court also refused to review the punitive damage award. That court acknowledged that it is charged with conducting a de novo review of the constitutionality of a punitive damage award. It said it would not conduct that review in this case, however:

> [W]e 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.[fn4]
>
> [fn4] 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.

Kimble II, ¶ 41 and n.4, App. 19.

First American, however, had devoted seven pages of its briefs to the punitive damage award. It recited in detail the standards to be applied for the review of a punitive damage award, and quoted the leading six decisions on the subject. It addressed each of the factors that this Court has identified are to be reviewed. First American cited a dizzying 63 cases, and made more than 110 citations to the record, in its 64 pages of appellate briefs. The record also contained six briefs filed by First American before the trial court, including the post-trial brief on the punitive damage award. (R.90)

Further, First American's discussion of its due process rights was hinged on lengthy earlier passages showing that its conduct was not wrongful. The brief explained that the property has always had access and that no policy coverage had been invoked (22 pages of

discussion), that First American had no duty to "defend" the Kimble lawsuit, and that the insurer had not acted in bad faith (seven pages of discussion). Beyond these subjects, there simply was nothing in the record concerning the punitive damage award that required citation, because there was no basis for the award.

Article I, Section 1 of our Constitution says that the State of Wisconsin will protect the rights of all people, who are equally free and independent and have certain inherent rights; and that our government has been instituted to secure these rights. When a jury imposes what appears to be a constitutionally excessive award, based on its ratio to compensatory damages, the defendant is entitled to an independent review of the "constitutional facts." *Garfoot*, 207 Wis. 2d at 233-35 (Abrahamson, C.J., concurring). The appeals court may not shirk its constitutional role in protecting those rights.

This Court has instructed lower courts to make an independent review of a punitive damage award that appears to be excessive. That standard is stood on its head if the reviewing court is excused from that review even

when the appellant has laid out the facts and the law on which the award was based. As Chief Justice Abrahamson has noted, "increasingly deferential review inappropriately permits an appellate court to tolerate a large margin of trial court error without ever making a close examination of the trial court's ruling." *Garfoot*, 207 Wis. 2d at 234 (concurring opinion). The appeals court gave inappropriate deference to the findings of the trial court and jury in this case.

IV. A Punitive Damage Award Must Punish Unlawful Conduct and the Amount Must Not be More than What is Required to Punish and Deter

The $1,000,000 punitive damage award violates First American's due process rights, and is excessive under our common law, because First American did nothing that this Court or the legislature has identified as being wrongful, and the amount of the award is so high in relation to the compensatory damages that it can only be classified as excessive and arbitrary.

The only rationale for punitive damages is that such an award will punish conduct that the state has a legitimate interest in controlling, and will deter others from

the same conduct in the future. Punitive damages serve a societal purpose when they punish and deter behavior already condemned by sound public policy. In *Strenke v. Hogner*, 2005 WI App 194 ¶ 22, 287 Wis. 2d 135, 704 N.W.2d 309, the court upheld a punitive award for personal injury caused by a drunk driver, noting that the "degree of reprehensibly is the most important factor in any excessiveness inquiry and the conduct in this case qualifies as egregious."

The Due Process Clause dictates that an individual receive fair notice not only of the conduct that will subject him or her to punishment, but also the severity of the penalty that the state may impose. *BMW*, 517 U.S. at 574. Thus, a punitive damage award that is fairly categorized as grossly excessive in relation to the state's legitimate interests in punishment and deterrence enters the zone of arbitrariness that violates the Due Process Clause. 517 U.S. at 568. As this Court has said, "[p]unitive damages ought to serve its purpose." *Malco, Inc. v. Midwest Aluminum Sales, Inc.*, 14 Wis. 2d 57, 66, 109 N.W.2d 516 (1961). Thus, the plaintiff must prove that the defendant

received fair warning in advance that its conduct would be punished.

This case does not illustrate conduct that has been previously identified as being wrongful. First American has received no prior warning that its conduct in this matter would be subject to the sanction of punitive damages. A punitive damage award in this case will also have no deterrent effect on others.

Even if the defendant has received fair warning, a punitive damage award violates due process if the amount is more than needed to serve their purpose, which is punishment and deterrence, or is disproportionate to the wrongdoing. *Trinity*, 2003 WI 46, ¶ 50. "[S]ome wrongs are more blameworthy than others and the punishment should fit the crime." *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 628, 563 N.W.2d 154 (1997).

Thus, a punitive damage award is unconstitutional if it is disproportionate to the wrongdoing or in an amount that is more than what is necessary to punish and deter conduct that the State has a legitimate interest in regulating. *Management Computer Servs.,* 206 Wis. 2d at

193; *Tucker,* 142 Wis. 2d at 446; *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 303, 294 N.W.2d 437 (1980). "The principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'" *BMW,* 517 U.S. at 575, n.24 (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)). The purpose of punitive damages is to punish and deter, not to compensate the plaintiff. *Management Computer Serv.*, 206 Wis. 2d at 193; *Wangen*, 97 Wis. 2d at 303; *Fahrenberg*, 96 Wis. 2d at 234; *Malco*, 14 Wis. 2d at 66.

Even if this Court finds that First American handled this matter incorrectly and had been fairly warned, the amount of the punitive damage award is clearly excessive.

Wisconsin considers three large factors in determining whether a punitive damage award violates due process: (1) the degree of egregiousness of the conduct; (2) the disparity between the harm or potential harm suffered and the punitive damages; and (3) the difference between the punitive damages and possible civil or criminal penalties for the conduct. *Trinity*, 2003 WI 46, ¶ 52 (citing

BMW, 517 U.S. at 574-75; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

The Stevensons did not establish proof of any of these three factors, which are discussed in turn.

V. First American's Conduct Was Not Egregious

The most important factor in weighing whether or not a punitive damage award is "grossly excessive" is the nature of the defendant's conduct, which must be proven to have been reprehensible. *Trinity*, 2003 WI 46, ¶ 57. Punitive damages serve a societal purpose when they punish and deter behavior already condemned by sound public policy. Thus, in *Strenke v. Hogner*, 2005 WI App 194, ¶ 22, 287 Wis. 2d 135, 704 N.W.2d 309, the court noted that the "degree of reprehensibly is the most important factor in any excessiveness inquiry and the conduct in this case qualifies as egregious." 2005 WI App 194, ¶ 22.

Wisconsin has enumerated six factors to consider in measuring the egregiousness of the party's conduct. They are: (1) the grievousness of the acts; (2) the degree of malicious intent; (3) whether the award bears a reasonable relationship to compensatory damages; (4) the potential

damage; (5) the ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; and (6) the wealth of the wrongdoer. *Trinity*, 2003 WI 46, ¶ 53.

In determining if the defendant's conduct was reprehensible, the Court considers whether the harm it inflicted was physical or economic; whether the conduct evinced a reckless indifference to the health or safety of others; whether the harm resulted from intentional malice, trickery, deceit as opposed to mere accident; whether the target was financially vulnerable; and whether the conduct was single and isolated or involved repeated actions. *Strenke*, 2005 WI App. 194, ¶ 16 (citing *Campbell*, 538 U.S. at 419).

First American will analyze the reprehensibility factor of the constitutional review based on the above six factors.

A. The Stevenson-Kimble Claim Was Economic Only, and First American Did Not Endanger Anyone's Health or Safety

The first two factors in analyzing the reprehensibility of the defendant's conduct are whether the defendant

caused physical harm was economic damage only, and whether the defendant evinced a reckless indifference to the health or safety of others.

These factors weighed heavily in the plaintiff's favor in *Strenke*, in which the defendant injured the plaintiff in a car accident he caused because he was thoroughly drunk. The court said that the "state's interest in punishing and deterring drunk driving within its own jurisdiction is powerful and well-established." 2005 WI App 194, ¶ 21. It cited statistics showing that drunk driving is a "terrible scourge" on society. *Id.* In addition, the *Strenke* court noted, the defendant's conduct "was part of an admitted pattern of conduct" because he had had four prior convictions for drunk driving. *Id.* at ¶ 23.

Strenke distinguished two leading United States Supreme Court cases that struck punitive damage awards because they involved only money, not physical harm, and the conduct had not been flagged by society as being reprehensible. *Campbell*, 538 U.S. 408 involved an insurance claim. *BMW*, 517 U.S. 559, concerned an automobile sale.

This Court, likewise, has held that a case involving only economic injury provides less foundation for a punitive damage award than one involving violence or physical harm. *Management Computer Serv.*, 206 Wis. 2d at 195-96.

In this case, First American did not cause physical harm to the Kimbles or recklessly endanger their safety. This case is about a trespassing driveway and an insurance contract. There were no personal injuries. The lack of these factors in this case weigh heavily against the purpose of punishing reprehensible conduct.

B. First American Was Not Malicious Toward and Did Not Trick the Kimbles, and Was Not Recklessly Indifferent

Because this case involves only money, the Stevensons were required to prove that First American was intentionally malicious toward the Kimbles or tricked them, or was recklessly indifferent to their rights, in order to justify an award of punitive damages. The record shows that the Stevensons did not prove any such conduct.

A punitive damage award against an insurer may be upheld when a claim is denied in bad faith and based on an

evil motive. *See Trinity*, 2003 WI 46, ¶ 45. The punishment of such an evil motive "sends a message" to insurers about the perversity of the conduct and the degree of punishment that is attached to it.

In this case, the verdict did not include a special interrogatory asking if the jury found First American to have acted maliciously or with reckless indifference. (App. 6, R.83) Thus, the jury did not even make such a finding. The punitive damage award is premised only on a finding that First American acted in bad faith, which in turn depended on the trial court's ruling that policy coverage had been invoked.

The existence of coverage was hardly obvious. The Policy insures a right of access. The trial court did not rule that the Property was landlocked. He ruled that a letter *threatening* to close off the cutoff road made title *unmarketable*. He said:

> Marketable title, in my determination, is liens, encumbrances, matters affecting that property which affect the sale price of that property. Obviously, the Kimbles had this property for sale. … I don't know what could affect marketability of title more than somebody trying to sell their property and their realtor

> getting a letter from—like this from a neighbor saying, "You don't have access to that property."

(App. 74-75, R.120:139-40) His ruling about access was limited to the following aside a minute later:

> I think there is—you know, was there access or not access, like I said, you know, there was a letter written saying you don't have access.

(App. 75, R.120:140) However, no court in this state or any other has held that a neighbor's threat to remove a driveway because it trespasses renders the title to the trespassing owner's parcel unmarketable.

The court of appeals flipped the marketability and access issues. That court also did not declare the Kimble property to be landlocked, making only glancing statements about the access coverage. It did not address the marketability coverage.

The Stevensons, not First American, had the burden of proving that policy coverage had been triggered. Unless Policy coverage was invoked, there could be no breach of contract. Without a breach, First American could not have acted in bad faith. Without bad faith conduct plus malice,

there is no legal or factual foundation for a punitive damage award.

The Stevensons' case, however, rested entirely on the conduct of a First American insurance underwriter. Mr. Donald Schenker testified that he was asked in 2008 to insure a buyer's title if the Kimbles sold the house. He informed the Kimbles that First American would insure the buyer's title. Mr. Schenker did not consider that request to be a claim. (R.122:29)

A year later, still without submitting a claim, the Kimbles sued First American. The company employee who shepherded the suit was Ms. Kerry Dahm, in the regional claims center. (R.122:29) She was not called as a witness. Her deposition was made an exhibit at trial. (R.85, Ex. 129; Dahm deposition transcript referred to at R.122:183) The Stevensons also did not call as witnesses either of the two lawyers hired by the Kimbles.

What Mr. Schenker said when asked to insure a buyer's title was not even relevant to the question of whether or not First American acted maliciously in defending itself in this lawsuit. Nonetheless, the

Stevensons argued to the jury, the appeals court and this Court that First American acted in bad faith, based solely on what Mr. Schenker did or did not do. They continue to seek to mislead this Court, by referring to Mr. Schenker as First American's "long-time claims handler." Pet.Resp. p. 21

This Court should not consider Mr. Schenker's conduct in deciding if First American acted reprehensibly in handling a claim. Moreover, what Mr. Schenker actually said does not support a punitive damage award. The Stevensons identify only three things that Mr. Schenker said that they believe support the punitive damage award. None of what he said was incorrect, much less intentionally deceitful. The Stevensons did not provide expert testimony that First American's actions were wrongful, much less so violative of insurance industry standards as to evidence malice or evil intent.

C. Mr. Schenker Did Not Deny a Claim

First, the Stevensons say that Mr. Schenker "denied" the Kimble claim. Pet.Resp. p. 23. He did not. Mr. Schenker is the head insurance underwriter in Wisconsin

for First American. The Kimbles' lawyer Mr. Smith admitted that the cutoff road was built outside the path of any easement grant. (R.122:250) Nonetheless, he asked Mr. Schenker if First American would insure a buyer's right to use the cutoff road. (R.85, Ex. 104) Mr. Schenker wrote a letter explaining that First American would provide the same insurance coverage to a buyer as was found in the Kimble policy, and why. (R.85, Ex. 44)

Mr. Schenker agreed that someone had built a cutoff road that veers off the North Easement path to the west, onto land owned by Land Concepts, and that it was the cutoff road that trespassed. (See R.1:17, Ex.9) He was not willing to insure the use of the cutoff road because there was no easement grant for that path. (R.122:97) His letter said:

> Exactly who built the cutoff road that is currently being used by the Kimbles to access their property from Highway M is a matter in dispute. … A [1989] survey … shows the cutoff road that was built sometime after the Andersons came into title and deviates in part from the private road referred to [in a 1950 deed]. It is this deviating part of the Kimble road that gives rise to any claim by Land Concepts. There is no valid instrument of record establishing the right of the Kimbles to

> the use of the cutoff road. …[W]e cannot say if the Kimbles have some prescriptive right to the continued use of the cutoff road. … Since the Kimbles enjoy a right of access [over the North Easement], title to the property is as insured. The policy does not insure any right to the use of the cutoff road. … First American Title Insurance Company stands ready to reissue the policy issued to the Kimbles under the same coverage provided to the Kimbles. …

(R.85, Ex.44) Mr. Schenker wrote two more letters, in May and June of 2008. (R.85, Ex's 65, 66)

Mr. Schenker's letters were not claim denials. In none of the three letters did Mr. Schenker even use the words "claim" or "deny." Mrs. Kimble admitted this in her trial testimony. When the Stevensons' counsel tried to get her to testify at trial that First American had denied her claim in 2008, she corrected him, saying that Mr. Schenker had not use the word "denied." Rather, she said, in 2008, the Kimbles had:

> tried to get access going to another place, and we asked the title company if they would insure that, and they wouldn't. They said they would insure access, but they wouldn't define where the access was.

(R.121:181) She also testified that First American "would warrant access but not specifically the location of the access." (R.121:199)

Thus, the record is clear that Mr. Schenker did not deny a claim made by the Kimbles. He offered to insure a buyer's title, which is the antithesis of reprehensible conduct by an insurer. No matter how the Stevensons may twist his words, Mr. Schenker did not act maliciously, trick the Kimbles or treat them with reckless indifference.

D. Mr. Schenker Did Not Deliberately Misrepresent Any Material Fact

Second, the Stevensons say that Mr. Schenker "misrepresented" that the North Easement was valid. Pet.Resp. pp. 11, 22-24, 41, 48. This is false. Mr. Schenker did not opine about the validity of the North Easement. He merely explained his reasoning about the insurance coverage that First American was willing to provide to a purchaser.

The Stevensons say Mr. Schenker should have opined that a 1955 deed to the Cofrins made the validity of the North Easement questionable. Pet.Resp. pp. 22-24. Mr.

Schenker was not dispensing legal opinions, but stating what First American would insure. This Court has declared that a title insurance policy is not a guarantee or an opinion of title, but an indemnity contract. *Greenberg v. Stewart Title Guar. Co.*, 171 Wis. 2d 485, 492 N.W.2d 147 (1992).

The Cofrin deed was a red herring. Erna Brand owned a number of parcels. She had a survey drawn in September of 1955 showing the North Easement as access for her parcels, including the Stevenson and Kimble land. (R.85, Ex.48) However, in July of 1955, just before the map was drawn, Brand conveyed the northern-most parcel to Gilbert and Joan Cofrin. (R.85, Ex.100) That deed did not specifically reserve the North Easement. Brand conveyed the Stevenson and Kimble parcels to the Andersons in 1956 and 1959, together with the North Easement.

Now, almost 60 years later, the Stevensons argue that Brand could not grant the North Easement in 1956 because she did not reserve it in the 1955 Cofrin deed. However, the Stevensons are estopped by their allegations *in this action* from so doing. Kimbles alleged *in this action*

that the North Easement was *valid*. (R.1:3, ¶¶ 10-11) Mrs. Kimble testified that the Kimbles bought the Property in reliance on the North Easement (R.121:172) and paid to maintain that road. (R.121:173-74) The Stevensons also alleged *in this action* that the North Easement was *valid*. (R.8:7) These admissions preclude the Stevensons from asserting in this suit that First American misrepresented as fact what both parties have already alleged is the truth.

The Stevensons are also barred by their actions from asserting that the North Easement is invalid. In 1990—23 years ago—the Stevensons recorded an affidavit from Alcyone Scott stating that their predecessors in title, the Andersons, had used the North Easement for many years without interference. (R.85, Ex.52) In 2001, when the Stevensons split their parcel in two by a recorded Certified Survey Map, they showed the North Easement as the sole means of access to the property. (R.85, Ex.47) They also got a title insurance policy insuring the North Easement. (R.85, Ex.56) They warranted the North Easement in the deed they gave to the Kimbles' sellers. (R.85, Ex. 25.) All

of those documents are admissions by a party opponent under Wis. Stat. § 908.01(4)(b).

In addition, Mr. Stevenson testified at trial that, after he and Mrs. Stevenson subdivided their property, but before they sold the Kimble lot, they too received a letter from Land Concepts claiming they could not use the cutoff road. The Stevensons retained Attorney Robert Ross, who located the West Easement and opined that the property *had* access. He also got a title insurer to agree to issue a policy to the lot buyer insuring access. Mr. Stevenson told Mr. Herrell or Ms. Dempster that there had been an issue regarding access when the Stevensons bought the property, but that issue had been resolved and the title insurance policy would insure access. (R. 121:279-82) The Stevensons may not now assert the opposite position.

Therefore, if the North Easement were invalid, it was the Stevensons who misrepresented its status. It is highly disingenuous for them to now assert that Mr. Schenker misrepresented a fact about the North Easement by agreeing to insure title, when they have mapped,

warranted, obtained insurance for and asserted that the easement is valid in their pleading in this very action.

Moreover, the trial judge never addressed the Cofrin deed. He certainly did not rule that the North Easement was invalid due to that deed. The trial court's access ruling was limited to the trespassing west cutoff road, not the North Easement path. Thus, none of what the Stevensons say about what First American said about the Cofrin deed was even appropriate testimony for the jury.

In any event, the Stevensons do not say that Mr. Schenker deliberately made any false statement, only that he should have told the Kimbles about the Cofrin deed in his letter agreeing to insure title. However, the Kimbles were already aware of the Cofrins. Mrs. Kimble testified that her lawyer met with Tom Cofrin, the son of the 1955 Cofrins, at the Property even before he received Mr. Schenker's letter. (R.121:211-213) Tom Cofrin came over "to show where he thought there had been access" along the North Easement path across the former Cofrin parcel, now owned by the Drakes. (R.121:212)

Even if Mr. Schenker failed to tell the Kimbles a fact, the Stevensons do not even assert that he made a deliberate false statement. The United States Supreme Court has held that "the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists." *BMW,* 517 U.S. at 580. Even the omission of a fact that supports tort liability "does not establish the high degree of culpability that warrants a substantial punitive damages award." *Id.*

Mr. Schenker's offer to insure letter did not create tort liability. He certainly did not make a deliberate misrepresentation of fact or mislead the Kimbles.

E. Mr. Schenker Did Not Have a Duty to Dig for More Records

The Stevensons' third argument is that, in 2008, Mr. Schenker should have told a title searcher to "dig for more records" about the Property. They say the failure to dig further resulted in an inadequate investigation of the Kimble insurance claim. Pet.Resp. p. 22.

This case is not like *Trinity*, in which the insurer's inadequate claim investigation caused it to deny a covered claim. Mr. Schenker pulled public records in 2008, when asked to evaluate a request to issue a new policy. He got those records to make an insurance underwriting decision. The Kimbles sued First American in 2009 in lieu of a claim notice. Thus, what Mr. Schenker did in 2008 was not part of a claim investigation.

Also, the Stevensons admit that First American searched 50 years of public records. They assert that Mr. Schenker was recklessly indifferent to the Kimbles' rights only because he told the title searcher "not to look any further… ." Pet.Resp. p. 22. How much searching of public records is enough before making a decision to insure a title? This court has already answered the question, holding that a title insurer is not required to search *any* public records before insuring title. *Greenberg,* 171 Wis. 2d 485. The Stevensons provided no expert testimony that would suggest that the searching of public records is part of a normal title insurance claim investigation, or that there

is an industry standard about how *many* such records to search.

Further, the Stevensons' arguments are inconsistent. On the one hand, they assert that First American did not locate enough real estate records. On the other, they say that it "withheld the information" that it did obtain about the Cofrin deed. Pet.Resp. p. 22. Which is it? An insurance company has no duty to abstract title and report the results to the insureds as part of a claim investigation.

Finally, a claim investigation is adequate if the insurer reviews enough information to make an informed coverage decision. The Stevensons do not identify any public record that First American failed to obtain that affected policy coverage or that would have changed its coverage analysis.

The Stevensons did not call an expert witness to testify that First American's claim handling was subpar. They did not even call First American's claim handler as a witness. Thus, the jury did not hear any testimony on which to form a conclusion that could support a punitive damage award.

Even if there was something deficient in what Mr. Schenker said or did, he was not intentionally malicious, deceitful or recklessly indifferent. In *Trinity*, this court said that punitive damages require proof of more than mere negligence:

> …[D]e novo review of the degree of reprehensibility of the defendant's conduct depends in part on whether the conduct was violent, caused physical injury, or was "purely economic," and whether it involved "trickery and deceit" or something closer to mere negligence.

Trinity, 2003 WI 46, ¶ 101.

For all of the above reasons, there was no proof that First American was guilty of the all-important element of malice, trickery or reckless indifference. Without a physical injury, malice or trickery, there was no basis for a punitive damage award.

F. The Stevensons Produced No Evidence of Repeated Actions or "Recidivism"

When a case involves one incident that is not heinous enough to warrant punitive damages, such an award may still be supported if there is proof that the act was part of a pattern. Repeated-action or recidivism evidence helps prove malice and justify a larger dollar amount.

Thus, when a car buyer suffered a loss in his car's value of $4,000 because BMW had sold the auto as new when it was not, proof that BMW had sold 900 other cars in the same fashion helped support a punitive award of $4,000,000, which is $4,000 multiplied by 1,000. The United States Supreme Court said:

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. … Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

BMW, 517 U.S. at 576-77. Even so, the court struck the award and remanded the case, because the automaker's practice was not illegal. In *Trinity*, this Court described Tower Insurance as a "recidivist" violator, both to support a finding of malice and to justify the amount of the award, because it had previously issued a decision involving Tower involving the same issue of policy reformation. *Trinity*, 2003 WI 46, ¶ 57.

However, there must be actual proof of a pattern of reprehensible conduct. In *Campbell*, an insurer contested liability about an accident that caused a death and a serious injury, declined to settle the claims for policy limits, took the case to trial while assuring the insured that he had no liability, and then refused to appeal a verdict against the insured for three times policy limits. That conduct was clearly reprehensible. Nonetheless, the high court struck down a punitive damage award when there was no proof that the insurer's claim handling was part of a larger pattern of similar conduct:

> In this case, State Farm's handling of the claims against the Campbells merits no praise, but a more modest punishment could have satisfied the State's legitimate objectives. Instead, this case was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country.

538 U.S. at 409.

First American is not a recidivist. The Stevensons provided no evidence that First American's conduct in this claim was part of a larger wrongful pattern. It is difficult even to imagine what "pattern" of wrongful conduct might

be suggested by what First American did in defending itself in this action.

Further, even if this Court assumes that First American's policy coverage position was incorrect, that view of the limits of policy coverage is orthodox and supported by many decisions and learned treatises. See App.Ct. Brief pp. 8-25. First American's statement of policy coverage did not waffle or change over time. The Policy covers a "right of access." It does not cover a trespass, which is entry on land without a right. *Southwest Title Ins. Co. v. Woods*, 449 S.W.2d 773 (Tex. 1970). The policy does not assure that the access path has been improved with a road or crosses passable terrain. *Title & Trust Co. of Florida. v. Barrows*, 381 So. 2d 1088, 1089 (Fla.App. 1979); *Hocking v. Title Insurance.& Trust Co.*, 37 Cal. 2d 644, 234 P.2d 625, 651 (1951); *Hulse v. First American Title Ins. Co.*, 2001 WY 95, 33 P.3d 122. The Stevensons produced no cases suggesting that First American's coverage position was incorrect or taken in bad faith.

Thus, there is no evidence of repeated wrongful actions by First American to bolster the punitive damage award.

G. The Kimbles Were Not Financially Vulnerable

Another factor in weighing the grievousness of First American's conduct is whether or not the Kimbles were financially vulnerable. They were not.

The Kimbles had just built a $1.5 million home on the shore of Green Bay, after tearing down a home they bought for $370,000. (R.121:175-7) Mrs. Kimble is a sales representative for the Kohler Company. (R.121:170)

The Kimbles were not besieged. They used the cutoff road every day. (R.121:229, 230-31) It was never blocked, despite the fact that it was a trespass. (R.121:183, 216-17)

The Kimbles had the money to hire two excellent lawyers. First American received notice of this suit when the complaint was served on it. (R.122:254)

The Kimbles also did not need First American's money to buy the cutoff road easement. Although First American had been sued, it was excluded from the settlement. The Stevensons bought the cutoff road

easement for themselves and the Kimbles, and paid the Kimbles $10,000. (R.35:16-46) This solved the Stevensons' warranty liability. The Kimbles assigned their rights against First American to the Stevensons as part of that deal. (R.35:16-46) In the end, the Kimbles were out only their attorneys' fees.

The Kimbles were not financially vulnerable, and did not behave like they were.

H. First American's Wealth

The final factor in a de novo review of the reprehensibility of a defendant's conduct is its wealth. The Stevensons' counsel thumped First American's size to the jurors, telling them (incorrectly and without evidence) that First American "is so big that this case doesn't mean anything to them, doesn't mean a single thing." (R.122:354) He followed this with a series of made-up comments about First American's supposed uncaring attitude, all pulled from thin air. Id.

The fact that a defendant corporation is big is not a justification for a punitive damage award. Rather, as Justice Breyer noted in his concurrence in the *BMW*

decision, the factor of size "cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *BMW*, 517 U.S. at 591. Instead, the majority in *BMW* noted that even big companies are entitled to due process:

> The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.

Id. at 585. A defendant's size is used only to determine if the amount of the award in relation to the defendant's assets is neither too little to send a message, if one is deserved, nor too great for the party to bear.

The Stevensons improperly argued to the jurors that First American's size alone should be counted against it. Counsel's statement that this case "doesn't mean anything" to First American was purely the product of his calculated hyperbole. The only First American employee who testified was the person who agreed to insure a buyer's title. The

"doesn't mean anything to them" comment clearly moved the jury to the "passion and prejudice" that made this award unconstitutionally excessive.

Also, the Stevensons provided no proof of First American's size, substituting mere argument by counsel for the appropriate expert testimony. In closing argument, counsel merely stated that First American is a "Fortune 500 company and now Fortune 800 company… ." (R.122:352) In *Trinity*, by contrast, an expert witness analyzed for the jury the defendant insurer's financial statements and its assets, net worth and retained earnings to provide an opinion about the size of an award. This Court concluded in *Trinity* that the expert testimony provided the foundation for the size of the punitive damages award. *Trinity*, 2003 WI 46, ¶ 69. No such foundation was laid in this case.

In conclusion, the Stevensons did not prove any of the six factors that this Court considers in analyzing the first element concerning the constitutionality of a punitive damage award, the egregiousness of the defendant's

conduct. This Court should strike the award on that basis alone.

VI. There Is Great Disparity Between the Harm or Potential Harm and the Punitive Damage Award

If a court determines that the plaintiff has proven that the defendant's conduct was sufficiently egregious to warrant the imposition of a punitive damage award, the court considers the second element, whether or not the amount of the award is reasonably related to the conduct. This Court has said that "[e]xemplary or punitive damages should reflect 'the enormity of [the] offense.'" *Trinity*, 2003 WI 46, ¶ 101 (quoting *BMW*, 517 U.S. at 575.) (internal quotation marks omitted).

No such review of this element is required in this case, because First American's conduct was not reprehensible. However, in addition, there was enormous disparity between the actual harm and the amount of the punitive damage award, making it excessive and unconstitutional.

The trial court reduced the compensatory damage award from $50,000 to $29,738.49 after trial, based on the

attorneys' fees paid by the Kimbles in prosecuting their lawsuit and survey fees. (App. 83-85)[3] This increased the ratio from 20:1 to 33:1. If the judge had credited the $10,000 the Stevensons paid the Kimbles, the compensatory award would have been $19,738.49, making the ratio an even more eye-popping 50:1. An award of 33:1 or 50:1 does not withstand scrutiny.

The Wisconsin legislature capped punitive damages at twice compensatory damages or $200,000, whichever is greater. Wis. Stat. § 895.043(6), created by 2011 Act 2, § 23m. This trial was conducted just one month after the law went into effect. Had this lawsuit been filed just a short time later, the law would have applied.[4]

The legislature's promulgation of a 2:1 ratio in 2011 is strong evidence that an award with a higher ratio is excessive. Damage-capping legislation is an important

---

[3] First American was not required by the Policy to prosecute this action for the Kimbles. The title insurance policy requires First American to defend its insureds "in litigation in which any third party asserts a claim adverse to the title or interest as insured," but not to prosecute a suit brought by the insureds. Also, the Policy requires the insured to tender his or her defense to First American, which the Kimbles did not do. See Conditions & Stipulations 4(a) of the Policy. (App. 50-56, R.85, Ex. 43).

[4] The law went into effect on February 1, 2011, and "first applies to actions… that are commenced on the effective date of" the law. 2011 Act 2, § 45(5). This action was commenced on June 3, 2009 and the Stevensons' claims against First American were filed on August 6, 2010. (R.1, 25)

consideration when a court assesses proportionality of an award. As Justice Ginsburg said in *State Farm*, "[t]he large size of the award upheld by the Utah Supreme Court in this case indicates why damages-capping legislation may be altogether fitting and proper." *Campbell*, 538 U.S. at 431 (dissenting opinion). Our legislature had spoken even before the trial of this case, in response to excessive and arbitrary awards like this one. The ratio explicitly adopted in the statute must serve as at least a benchmark for the ratio that passes constitutional muster in this case. To permit a 33:1 or 50:1 ratio to stand in a case decided just before the 2:1 ratio statute was adopted would itself smack of a substantive Due Process violation of First American's rights.

Further, the statutory damage cap is consistent with case law as applied to these facts. The 2:1 ratio described in our law would yield a punitive damage award of $59,476.98. If this punitive damage award were capped at the statute's limit of $200,000, the ratio would be roughly 7:1, the same ratio this Court let stand in *Trinity*.

Even before the Wisconsin law the damage-cap statute, a 7:1 ratio had long been considered on the far upper end of the range of constitutionality. A ratio that large is appropriate only when the conduct was truly reprehensible, unlike First American's conduct in this case. In *Haslip*, the court concluded that a 4:1 ratio was "close to the line… ." 499 U.S. at 23. *See also Campbell*, 538 U.S. at 425; *Strenke*, 2005 WI App 194, ¶ 17.

In some cases, courts have considered the dollar amount of potential harm faced by the plaintiff as part of the ratio. In *Trinity*, this Court let stand the 7:1 ratio stand based on the insured's potential harm as a defendant in a personal injury lawsuit. The cost of settling that action was potential harm to the insured because the insurer sought a declaration that there was no policy coverage. However, the Court measured the potential harm as the dollar amount actually paid to settle that lawsuit, not the potential exposure. 2003 WI 46, ¶ 65.

In *BMW*, the United States Supreme Court struck down an award even though the potential harm brought the ratio to approximately 1:1. In *TXO*, that court did not

overturn an award when "'*the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred'" was less than a 10:1 ratio. *TXO*, 509 U.S., at 460 (quoting *Haslip*, 499 U.S. at 21).

In this case, the Stevensons presented the jury with a nonsensical list of elements of supposed compensatory and potential damages. Counsel had Mrs. Kimble testify about a "Summary of Damages" that listed "actual damages" of:

Attorney Expenses	$27,252.49
Surveyor Expenses	2,486.00
Property Taxes 2009 and 2010	17,254.89
Mortgage Interest 2009 and 2010	50,401.99
Subtotal	**$97,395.37**

The summary also listed "potential damages" of:

Mortgage Principal 2009 and 2010	$15,213.78
"Pay and Walk"	370,000.00
Subtotal	**$385,213.78**
Total Actual and Potential Damages	**$482,609.15**

(R.85, Ex's 67, 115; R.121:204-210) First American objected to the use of the exhibit. (R.121:210) The judge ordered the Stevensons' counsel to remove certain numbers from the chart, after it had been shown to the jury, but allowed the chart to be used in closing argument. (R.121:259-60)

The Stevensons' counsel referred to this chart throughout his closing argument. (R.122:349-52, 382-85) He suggested a punitive damage award of five to seven times the "total actual and potential damages" as shown on the chart. (R.122:383) The jury verdict of $1,000,000 is approximately *two* times the total "damages" recited by the chart. Thus, despite all of the ways in which the jury was led to believe a false story, it still awarded only twice the claimed potential damages.

The Kimbles did not face exposure of $482,609.15 that was "likely to result from" First American's conduct. The principal and interest on the Kimble loan, and the real estate taxes they paid, were not harm or potential harm caused by First American. Those are normal expenses of home ownership.

The Stevensons tried to connect the Kimbles' mortgage payments to First American by eliciting testimony from Mrs. Kimble that they were delayed in refinancing their loan because a lis pendens was recorded against their house. (R.122:222) However, on cross-examination, Mrs. Kimble admitted that her lawyer had

recorded the lis pendens, and the loan closed as soon as he released it. (R.122:224-25) (See lis pendens at R:2) The loan payments were not "harm likely to result from" First American's conduct, and may not be considered in the constitutional analysis.

The $370,000 figure on the chart is the Policy amount. The Stevensons used that number based solely on the fact that Mr. Schenker said that, if there had been *no access* to the Property, First American might have paid as much as policy limits. (R.122:86) The amount of insurance held by the Kimbles was not a measure of potential harm that they might have suffered. Rather, that amount represents a benefit, as the amount of insurance coverage they continue to have against title risks.

Further, the Policy limits cannot represent the exposure the Kimbles faced in this lawsuit. Unlike *Trinity*, the Kimbles were not forced to defend themselves in a lawsuit. They were the plaintiffs. They were not at risk of having a money judgment entered against them. None of the people they sued had made money counterclaims against them. In *Trinity*, even though the insureds were

defendants facing a possible money judgment, this Court ascribed as potential harm the *actual cost* of settling the suit. The actual settlement payment in this case was $40,000, not $370,000. Therefore, the Policy limits do not represent potential harm to the Kimbles.

Further, Mr. Schenker did not testify that the property was landlocked. He was willing to insure access. He also did not opine as an appraiser. The Stevensons offered no testimony about the effect on value if the parcel had lacked access. Thus, Schenker's statement was irrelevant speculation that did not reflect potential harm to the Kimbles.

The Kimbles were not out of pocket any money beyond the compensatory damage amount of their attorneys' fees. The Stevensons paid for the cutoff road easement because they had been sued for breach of warranty. The cost of buying the new easement thus properly fell to, and stopped with, the Stevensons.

Thus, it was improper for the trial court to allow the Stevensons to use the Summary of Damages, which clearly influenced the jury. Rather, the Kimbles had no potential

harm beyond the compensatory damages awarded by the trial court. Had the trial court properly limited counsel to argument over compensatory damages, the jury would not have returned a 33:1 verdict.

Furthermore, sound public policy dictates that the Court not even consider possible harm to the Kimbles in evaluating punitive damages awarded to the Stevensons. The Stevensons had bought the Kimbles' bad faith claim like a lottery ticket. They stood before the jury cloaked in the Kimbles' bad faith claim. The trial judge did not allow First American's counsel even to inform the jury that the Stevensons had bought the claim. (R.120:162-3)

The Stevensons could not buy the Kimbles' "potential harm," however. The Kimbles' potential harm was erased when the Stevensons bought the cutoff road easement in the same agreement in which they bought the bad faith claim. The Stevensons may not now seek to prop up a punitive damage to themselves based on "potential harm" to the Kimbles due to a trespass that the Stevensons cured.

It would mock the Constitution to give the Stevensons an excessive award against First American,

contrary to due process based on such non-existent harm. This Court has said a punitive damage award is not "to compensate the plaintiff for any loss." *Trinity*, 2003 WI 46, ¶ 50. That rationale breaks down when a punitive damage claim is sold like a chattel to a fellow litigant who seeks to recover his expenses in the dispute.

Thus, there is no potential harm to support the award. The ratio of 33:1 or 50:1 may not stand. The Stevensons did not prove the second element concerning the constitutionality of a punitive damage award, that there is a strong correlation between the award amount and the dollar value of harm caused by First American.

VII. The Difference Between the Amount of the Punitive Damage Award and Possible Civil or Criminal Penalties for the Same Conduct

The final factor in the review of a punitive damage award is a comparison of the award to civil or criminal penalties that could be imposed for comparable misconduct. *Trinity*, 2003 WI 46, ¶ 66; *Jacque*, 209 Wis. 2d at 630. "The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." *Trinity*, 2003 WI 46, ¶ 66 (citation omitted).

In *Trinity*, this Court found that Wisconsin law provides a criminal penalty, including a fine of up to $10,000, for the violation of "any insurance statute or rule of this state." Wis. Stat. § 601.64(4), and that regulations prohibit unfair insurance claim settlement practices, including the "[f]ailure to attempt in good faith to effectuate fair and equitable settlement of claims submitted in which liability has become reasonably clear." Wis. Admin. Code Ins. § 6.11(3)(a)(4).

This last prong of the test also is not met in this case. Unlike *Trinity*, First American did not wrongly fail to settle a claim. It offered to contribute to the cost of buying an easement for the trespassing cutoff road despite the lack of coverage. It was excluded from the settlement. (R.122:209-21)

The Stevensons have not demonstrated that First American violated *any* statutory duty or would be subject to *any* penalty, either criminal or civil, for the manner in which it has defended itself in this lawsuit. The Stevensons did not prove the third and final element of the test for the constitutionality of a punitive damage award.

CONCLUSION

The punitive damage award violates the Due Process clause of the Wisconsin Constitution. It is excessive and not reasonably proportionate to the compensatory damages, but rather is 33 times that amount. Further, the award cannot be rationalized based on any potential harm in a greater amount.

For the foregoing reasons, First American respectfully requests that this Court strike the punitive damage award in its entirety. In the alternative, First American asks this Court to reduce the punitive damage award to $59,476.98, which is twice the amount of the compensatory damages. In the further alternative, First American asks this Court to reduce the punitive damage award to $200,000, in conformity with the damage cap set by Wis. Stat. § 895.043(6).

Respectfully submitted this 12th day of August, 2013.

Reinhart Boerner Van Deuren s.c.
N16 W23250 Stone Ridge Drive,
Suite 1
Waukesha, WI 53188
Telephone: 262-951-4500
Facsimile: 262-951-4690

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

s/J. Bushnell Nielsen
J. Bushnell Nielsen
WI State Bar ID
No. 1014758
bnielsen@reinhartlaw.com
Rebecca Leair
WI State Bar ID
No. 1003955
rleair@reinhartlaw.com
Attorneys for Defendant-Appellant-Petitioner First American Title Insurance Company

REINHART/10063733

SUPREME COURT OF WISCONSIN

Robert L. Kimble and Judith W. Kimble,
Plaintiffs,

v. Appeal No. 2011AP1514

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-Petitioner.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and section 809.62(4)(a) for a brief and appendix produced with proportional serif font. The length of this brief is 10,816 words.

Dated this 12th day of August, 2013.

Reinhart Boerner Van Deuren s.c.
N16 W23250 Stone Ridge Drive,
Suite 1
Waukesha, WI 53188
Telephone: 262-951-4500
Facsimile: 262-951-4690

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

s/J. Bushnell Nielsen
J. Bushnell Nielsen
WI State Bar ID
No. 1014758
bnielsen@reinhartlaw.com
Rebecca Leair
WI State Bar ID
No. 1003955
rleair@reinhartlaw.com
Attorneys for Defendant-
Appellant First American
Title Insurance Company

SUPREME COURT OF WISCONSIN

Robert L. Kimble and Judith W. Kimble,
Plaintiffs,

v. Appeal No. 2011AP1514

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-Petitioner.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I certify that I have submitted an electronic copy of this this brief that complies with the requirements of Wisconsin Statutes section 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed in this matter. A copy of this certificate has been served

with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of August, 2013.

Reinhart Boerner Van Deuren s.c.
N16 W23250 Stone Ridge Drive,
Suite 1
Waukesha, WI 53188
Telephone: 262-951-4500
Facsimile: 262-951-4690

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

s/J. Bushnell Nielsen
J. Bushnell Nielsen
WI State Bar ID
No. 1014758
bnielsen@reinhartlaw.com
Rebecca Leair
WI State Bar ID
No. 1003955
rleair@reinhartlaw.com
Attorneys for Defendant-Appellant First American Title Insurance Company

SUPREME COURT OF WISCONSIN

Robert L. Kimble and Judith W. Kimble,
Plaintiffs,

v. Appeal No. 2011AP1514

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-Petitioner.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

I certify that I have submitted an electronic copy of the Defendant-Appellant-Petitioner's Appendix accompanying this brief that complies with the requirements of Wisconsin Statutes section 809.19(13).

I further certify that the electronic Defendant-Appellant-Petitioner's Appendix is identical in content and format to the printed form of the Defendant-Appellant-

Petitioner's Appendix filed in this matter. A copy of this certificate has been served with the paper copies of the Defendant-Appellant-Petitioner's Appendix filed with the court and served on all the parties.

Dated this 12th day of August, 2013.

Reinhart Boerner Van Deuren s.c.
N16 W23250 Stone Ridge Drive,
Suite 1
Waukesha, WI 53188
Telephone: 262-951-4500
Facsimile: 262-951-4690

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

s/J. Bushnell Nielsen
J. Bushnell Nielsen
WI State Bar ID
No. 1014758
bnielsen@reinhartlaw.com
Rebecca Leair
WI State Bar ID
No. 1003955
rleair@reinhartlaw.com
Attorneys for Defendant-Appellant First American Title Insurance Company

RECEIVED
10-29-2013
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

ROBERT L. KIMBLE AND JUDITH W. KIMBLE,

Plaintiffs,

v. Appeal No. 2011AP1514

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-Petitioner

BRIEF OF RESPONDENTS, JOHN AND JANE STEVENSON

On Appeal from the Judgment and Order of the Door County Circuit Court Case No. 2009CV188, The Honorable D. Todd Ehlers, Presiding

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Defendants-Respondents, John E. Stevenson and Jane E. Stevenson.
David H. Weber
T. Wickham Schmidt

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Statutes Cited

Other Authorities Cited

STATEMENT OF ISSUE

1. Was the trial court's ruling that the amount of the punitive damage award should stand proper, because the verdict comports with the Wisconsin Constitution and common law?

Answered by the circuit court: Yes.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND PROCEDURAL HISTORY

This appeal presents the question of whether a title insurer who knows full well its insureds lack a right of access to their home, but conceals that and misrepresents the facts when denying their claim for coverage, may be punished with an award of punitive damages approximating its insureds' potential loss. After all, the insureds in this case suffered under fear of not being able to get to or from their home for two years and also lost a bona fide $1.3 million sale, all while the title insurer misled them and steadfastly denied their title insurance claim.

Defendant-Appellant, First American Title Insurance Company, wrongfully and in bad faith refused to cover the claim of its insureds, Plaintiffs Robert and Judith Kimble, for unmarketable title and lack of a legal right of access to their homestead property. (R.83). Defendants-Respondents John and Jane Stevenson are the Kimbles' neighbors to the north and obtained an

assignment, which First American conceded was valid, to pursue these claims as part of settling the underlying access problems. (R.110:21; R.35, Ex. 3:31-33).

The Kimbles initiated this action in June 2009. (R.1). In October 2009, the Kimbles amended their complaint to add claims against First American for breach of their title insurance policy. (R.11). First American answered, denying all claims and liability — a position it maintained through trial and beyond. (R.16).

Litigation continued until a partial settlement establishing access was reached and finally executed in July 2010. (R.35, Ex. 3). As it did in all other phases, First American steadfastly refused any assistance to the Kimbles or participation in the settlement. (R.85, Ex. 127; R.122:182; R.85, Ex. 129, Dahm Tr. 14-15). In August 2010, based on the assignment, the Stevensons filed their current cross-claims against First American. (R.25).

In December 2010, First American moved for summary judgment, arguing the Policy was void because

the Kimbles "accepted liability" without First American's consent. (R.34:3-4). The Stevensons responded by arguing the Kimbles did not accept any liability in the settlement. (R.39:2-3, 13-14). They moved for partial summary judgment seeking to affirm the validity of their assignment, which First American conceded. (R.39:10-12; R.110:21). They also sought judgment showing the Kimble title had been unmarketable and lacked a right of access. (R.39:3-8, 16-18). On January 18, 2011, the circuit court held a hearing where it affirmed the validity of the assignment but denied the parties' other motions. (R.119).

In anticipation of trial, the parties submitted various motions in limine, including First American's motion to preclude evidence that the title was unmarketable. (R.63:2-5). At hearing on that motion, First American's counsel insisted that the circuit court first determine, outside the presence of the jury, whether the Kimbles' title was unmarketable or the property indeed lacked a right of access so as to trigger coverage

under its policy. (R.110:22, 68-72). Granting First American's request and motion, the trial court converted the first day of the scheduled jury trial into an evidentiary hearing. (R.111:17-19; R.120). After hearing the evidence First American wanted to present in its effort to refute the proof offered on summary judgment, the trial court found the Kimbles' title was unmarketable, there was no right of access to the property, and therefore coverage had been invoked. (R.120:136-43).[1]

A two-day jury trial followed. The jury rendered a verdict in favor of the Stevensons and the Kimbles, finding First American had denied the Kimbles' claim in bad faith. (R.83). The jury awarded $50,000 in compensatory and $1,000,000 in punitive damages. (*Id.*).

First American filed (late) post-verdict motions requesting the following relief: (1) reduction of the compensatory damages amount to $28,485.49; (2) modification of the answer to the bad faith question to

[1] First American misrepresents the trial court's ruling as only relating to the title being unmarketable, when the trial court also ruled that there was, in fact, no legal access to the land. (R.120:136-43; R.121:15-16).

"no" based on a claimed lack of sufficient evidence; and (3) setting aside of the verdict and grant of a new trial in the interest of justice based on the argument that the punitive damage award was excessive. (R.90; R.App. 12-26).[2] The trial court granted First American's first motion and denied the other two, reducing the compensatory damages award to $29,738.49 for attorneys' and surveyor fees actually incurred by the Kimbles but letting stand the jury's finding of bad faith and punitive damage award. (R.99, 123:11-12, 19-20, 27-30).

First American hired a new defense law firm and appealed. It raised eight separately enumerated arguments before the court of appeals. The court of appeals rejected them all as either meritless, waived during trial court proceedings, or insufficiently developed.

As regards the punitive damage award, the single issue this Court accepted for review, the court of appeals declined to review it because First American failed to develop its argument that the award was excessive.

[2] All references to R.App. are to the respondents' appendix originally filed with the court of appeals.

Kimble v. Land Concepts, Inc., No. 2011AP1514, unpublished slip op., ¶¶38-41 (Dec. 3, 2012). First American's appellate brief did not properly address its reprehensible conduct as found by the jury, its stubborn intransigence, the high value of the property its conduct jeopardized, its considerable wealth, or the trial court's actual reasoning for upholding the award. The court of appeals properly found that First American's constitutional due process argument was insufficiently developed because it "sets forth only broad and conclusory statements without citation to the record and without citation to legal authority." (Slip. Op., ¶41, n.4). The court of appeals also denied First American's motion for reconsideration, and its petition to this Court followed.

II. STATEMENT OF FACTS[3]

The Kimbles purchased the subject property, which is located in the Town of Nasewaupee, in October 2004. (R.85, Ex. 28). At that time, the Kimbles obtained title

[3] First American's brief contains numerous misstatements of fact and ignores much evidence supporting the jury's findings. So the brief reads more easily, many responses to these inaccurate assertions are confined to footnotes.

insurance from First American that promised to defend title and indemnify for any covered loss, including losses resulting from unmarketability of title and a lack of a right of access to the property. (R.App. 05-11; R.85, Ex. 43). The limit of liability on the title insurance policy was $370,000. (R.App. 08; R.85, Ex. 43).

After purchasing the property for approximately $355,000 (R.121:208), the Kimbles constructed a new, more elaborate home. As of 2008, the assessed value of the Kimbles' property was approximately $629,000. (R.121:227).

In early 2008, when the Kimbles began trying to sell their home, Defendant Land Concepts sent their realtor a letter dated March 5, 2008, asserting they had no right of access and could not convey access to any buyer. (R.121:179; R.85, Ex. 108). The letter provided in relevant part:

> In order to avoid possible future misunderstandings and/or confusion, it is important that you make prospective purchasers aware that the present owners of that property do not own –and cannot convey— any access rights to Highway M.
>
> …

> It is important that any prospective purchaser be aware of the lack of road access to Highway M.

(*Id.*).

Prior to this, no one had ever told the Kimbles their land lacked a right of access. (R.121:171-72). Their only access had always been over a private road to County Highway M. (R.121:174). Indeed, in conjunction with the Kimbles' purchase, a land survey was prepared that revealed no problem with access. (R.121:271-72; R.85, Ex. 116). The Kimbles would have never purchased the property if they knew it lacked a right of access. (R.121:172).

Mrs. Kimble and their realtor promptly met with the title insurer's local agent, Marilyn DeNamur, who advised Mrs. Kimble to hire a lawyer. (R.121:179-80). The Kimbles hired Sturgeon Bay Attorney James Smith, who formally submitted the claim to First American and continued corresponding with its agent. (R.120:48, 66-68, 79, 108, 235; R.122:22, 44-45, 86, 109, 144-45; R.85, Ex. 104, 105).

First American appointed its long-time claims handler, Donald Schenker, to handle the claim. (R.120:66-68; R.122: 109, 118, 144-45, 159, 222, 244). Schenker is a graduate from law school, holds a law degree, and has been working for First American in title insurance work for over 33 years. (R.122:9). He is an officer of the company and held the Assistant Vice President title for over 18 years. (*Id.*, p.12). He acknowledged that he, as a title agent, and insurance companies in general, have a specialized ability to review real estate records. (*Id.*, p.9).

Upon receiving the claim, First American conducted title research that revealed no instrument of record gave the Kimbles the right to use the private drive that they actually used to access their property. (R.122:62; 109, 118, 144-45, 159, 222, 244).[4] The title record did contain reference to a purported easement giving the Kimbles a right of access to the north (where no road actually

[4] First American includes and references a site plan marked as trial exhibit 50 throughout its briefing despite the fact that the trial court specifically excluded it from evidence as being without any foundation. (R.120:122, 133).

existed). (R:122:50-52). However, the deeds purportedly creating this easement dated to 1956 and 1959. (*Id.*). This posed an obvious problem, because the grantor of the easement (Brand) had conveyed what would have been the servient tenement, over which the easement ran, to another party (Cofrin) in 1955. (R:122:54-66). Thus, the so-called "north easement" was plainly invalid. (*Id.*).

On a Friday evening, March 28, 2008, after working on researching the access issue with Schenker, the local agent DeNamur sent an email to Schenker providing the deeds and other real estate records she had gathered and asked him: "Does that mean that the easement granted in 1956 and '59 is valid?" (R.122:123, R.85, Ex. 119; R.App. 43). DeNamur also asked if she should continue to dig for more records. (R. 122:41, 123).

Instead of taking her up on her offer, the following business day, Schenker outright denied the Kimbles' claim.[5] (R.122:49-50, Tr. Ex. 44; R.App. 01-03). Schenker

[5] At pages 32-33 of its brief, First American claims, based on an out-of-context quote from Judith Kimble who never even spoke to Schenker, that Schenker did not deny a "claim." First American was permitted to argue this to the jury, but abundant evidence in

admitted that the Kimbles had no right to use the existing driveway: "There is no valid instrument of record establishing the right of the Kimbles to the use of the cutoff road." (R.App. 02-03.) However, he told the Kimbles the opposite and that they had a right of access to the north based on the deeds from Erna Brand and Idlewild Development Corporation to the Kimbles' predecessors-in-interest, the Andersons, in 1956 and 1959, respectively. (R.App. 02).[6] Schenker emphasized these deeds in his letter, stating that they conveyed what became the Kimble property "[t]ogether with the use of a

---

the record proves otherwise and supports the jury's contrary findings. (R.120:66-68; R.122: 109, 118, 144-45, 159, 222, 244). Beyond the volume of testimony contradicting its argument, the documentary evidence also shows Schenker himself knew that his March 31 letter denied a "claim." He specifically included the notice required by WIS. STAT. § 631.28 and Wis. Admin. Code Ins. § 6.85(5)(c) when a title insurer indicates that "a claim is denied." (R.App. 03, R. 85, Ex. 44). First American's misleading arguments at pages 29-33 of its brief to the contrary notwithstanding, Schenker even followed up on his first letter days later with a second separate formal legal notice that is specifically required when a title insurer denies a claim. (R. 85, Ex. 120). First American never even alerts the Court to this contradictory evidence, much less explains why it should be ignored, while misrepresenting for several pages that Schenker never even handles claims.

[6] The letter references and discussed both the Anderson deeds but incorrectly states that the 1959 deed was dated in 1950. (R.App. 02). Schenker repeatedly testified that he understood the deeds to have both been dated in 1956 and 1959 when he wrote his letter. (R.120:55, R.122:40, 50, 95).

private road that connects above described property with County Trunk Highway." (*Id.*)

However, Brand had reserved no easement over the land to the north of the Kimbles' property when she conveyed that land to the Cofrins in 1955. Schenker knew about the Cofrin deed, but he did not mention it in his letter. (R.122:54-55).

Instead, to justify rejecting the claim, Schenker told the Kimbles that because they "enjoy[ed] a right of access to Highway M over the private road that was originally granted to their predecessors in title, Mr.& Mrs. Abner Anderson, title to the property is as insured." (R.120:53-54; R.122:155-60; R.App. 03). "Therefore, any dispute, requirement or adverse position taken by Land Concepts ... states no loss or damage under the terms of the policy." (*Id.*). Schenker closed his letter to Attorney Smith by referring to and enclosing notice pursuant to "Wis. Admin. Code Ins. § 6.85" regarding an adverse insurance coverage determination. (*Id.*; *see also* R.85, Ex.120).

Thus, as Schenker would later admit at trial, and contrary to his letter, the predecessors to the Stevensons, the Andersons, did not have and could not have obtained a private road easement from their sellers because, one year earlier, the Cofrins had purchased the necessary property (the "Cofrin Deed"). (R.122:56-60; R.85, Ex. 100; R.App. 27-28). Schenker's agent had alerted him to the problem, but he declined her offer to look further and then misrepresented the information he already had to the Kimbles.[7] (R.122:123, R.85, Ex. 119; R.App. 02-03).

Believing First American's representation that they had access, the Kimbles continued efforts to sell their home. (R.121:186). As time passed, the Kimbles became more desperate both financially and emotionally to sell

[7] At trial, Schenker changed his explanation of access from easement by warranty deed to one of "easement by implication". (R.122:64-65; R.120:78). Yet he admitted he never identified this theory to the Kimbles. (R.120:78-79). And his testimony also showed he had no factual basis to assert the theory because (1) there had not been any road in the area in 1955, as proved by first-hand accounts in the chain of title (R.122:66; R.120:97; R.85, Ex. 109; R.122:73; R.122:247; R.App. 29) and aerial maps of the area from the time in question (R.122:76; R.85, Ex. 51); and (2) no evidence showed the 1956 and 1959 grantors could have acquired another way of access for a reasonable sum (R.122:71-73). He begrudgingly acknowledged that these required elements were indeed missing from his new theory. (*Id.*)

their home so they could move and help Mrs. Kimble's parents who needed their local help. (R.121:189, 192-93). In the meantime, despite First American's assurances that the Kimbles had access, the dispute with Land Concepts continued to escalate. The Kimbles went to church one morning, only to return and find Land Concepts had cemented two posts on either side of "their" drive. (R.121:182). Schenker was advised, but stood firm on his denial of coverage while encouraging the Kimbles to pursue creating a new driveway through the property to the north. (R.122:93-97; R.85, Exs. 112, 123).

In January 2009, the Kimbles were fortunate enough to find a prospective buyer in the Muellers. (R.121:187-89). By January 12, 2009, the Muellers had signed a cash offer to purchase the Kimbles' home for $1.3 million. (*Id.*:189-92; R.85, Ex. 113). There was no financing contingency. (*Id.*) The Kimbles promptly agreed to buy another more modest house near her parents. (R.121:193-94, 226).

However, as part of the proposed transaction with the Muellers, the Kimbles were completely upfront about the situation and revealed the access issue as alleged by Land Concepts. (R.121:190). The Kimbles provided the Muellers with all Land Concepts' letters, and the sale was made contingent on the access issue being resolved. (*Id.*; R.85, Ex. 113). The offer to purchase gave the Kimbles 15 days to resolve the access issue to the satisfaction of the Muellers' attorney, and an additional 15 days grace period if necessary. (*Id.*).

The Kimbles tried desperately to negotiate a legal access route with Land Concepts, but Land Concepts refused to cooperate. (R.121:195-96).[8] The Kimbles offered the Muellers a credit off their purchase, but the Muellers would not agree and insisted on access being established before any sale. Trying to help, the Muellers even extended the deadline further once again, but with

[8] First American's apparent plan was to use the Kimbles to fight Land Concepts with indefinite threats to build a new access route to the north, figuring that Land Concepts would have to deal at some point in time. (R.122:129-30).

Land Concepts holding them hostage the Kimbles eventually lost the sale. (R.121:200).

Eventually, the Kimbles, the Stevensons, and Land Concepts did reach a settlement. The process took more than two years, and First American never authorized a single dollar in authority for settlement or assistance to the Kimbles at any time.[9] (R.85, Ex. 127; R.122:182, reading R.85, Ex. 129:14-15). By that time, the Kimbles had lost a $1.3 million sale of their home, and had no guaranty as to when or for how much they might be able to sell again. They also had paid $29,738.49 in attorney's fees and survey expenses incurred dealing with the access issue. (R.123:11).

[9] First American falsely claims it was excluded from the settlement and that no testimony was presented from the claims adjuster who transitioned in and handled the case while it was in litigation. The transcripts clearly show that her testimony was read in at trial, because she works outside state subpoena power in Illinois, and that First American steadfastly refused any assistance to the Kimbles despite repeated invitation throughout the case. (*See also* R.85, Ex. 127; R.122:182, reading R.85, Ex. 129, Dahm Tr. 14-15).

ARGUMENT

The trial court properly determined that the jury had a right to find First American's conduct highly egregious and impose substantial punitive damages as a result of the significant harm to which its conduct exposed its insured. After all, the Kimbles suffered under fear of not being able to get to or from their home for two years and lost a $1.3 million sale, all while First American misled them in an effort to support steadfast denial of their title insurance claim.

In a similar manner as it proceeded before the court of appeals, First American never squarely acknowledges any of this in briefing to this Court. While First American has expanded the length of its due process argument, it still fails to develop a theory respecting the constitutional facts found by the jury. The jury's punitive damage award should not be overturned.

I. FIRST AMERICAN FAILED TO PRESERVE ITS RIGHT TO APPEAL THE PUNITIVE DAMAGES VERDICT.

The Court should affirm the punitive damage verdict because First American has no right to appeal from it. It waived its appeal right by filing its post-verdict motion late.

First American purports to appeal the judgment rendered on a jury verdict after denial of its post-verdict motion challenging the punitive damage verdict on due process grounds. However, post-verdict motions under WIS. STAT. §§ 805.14(5) and 801.15(1) must be filed within 20 days after the verdict is rendered. WIS. STAT. § 805.16(1). If they are not, the circuit court lacks competency to even consider them. *Hartford Ins. Co. v. Wales,* 138 Wis. 2d 508, 515-16, 406 N.W.2d 426 (1987); *see also Northridge Co. v. W.R. Grace & Co.,* 205 Wis. 2d 267, 286-87, 556 N.W.2d 345 (Ct. App. 1996) (holding that circuit court commits error by granting tardy motion).

A party who fails to timely file a motion after verdict or seek an extension before the time for doing so

passes may not rely upon "excusable neglect" for relief. *Brookhouse v. State Farm Mut. Auto. Ins. Co.*, 130 Wis. 2d 166, 169-70, 387 N.W.2d 82 (Ct. App. 1986). First American's post-verdict motions were filed one day late; accordingly, the circuit court lacked competency to consider them. (R.83, 90).

This Court's recent precedent confirms that First American's waiver should be held against it. *Northern Air Services, Inc. v. Link*, 2011 WI 75, 336 Wis. 2d 1, 804 N.W.2d 458. Dismissal of First American's appeal should meet no more resistance under a manifest miscarriage of justice standard than did the result in *Link*. Indeed, in this case, unlike in *Link*, the trial court specifically reviewed and approved the jury's punitive damage award, concluding that it was *not* excessive. Three court of appeals judges in this state have also let the award stand. First American's appeal presents no issues of personal liberty that militate in favor of a different result now.

For their full argument and support on this issue, the Stevensons rely on their briefing and submissions

presented with their motion for summary disposition in accordance with the Court's October 2013 Order.

II. THE JURY CHOSE A REASONABLE PUNISHMENT FOR FIRST AMERICAN'S ACTIONS

First American's appeal presents only a due process challenge to the punitive damages award in this case. As explained below, this challenge lacks any merit.

A. Standard of Review

Even if the Court were to reach the merits of First American's appeal and consider the due process validity of the punitive damage award, its review is *de novo*, but only "when an award can be fairly categorized as 'grossly excessive,' in relation to the state's interests in punishment and deterrence, does it enter the zone of arbitrariness that violates due process." *Trinity Evangelical Lutheran Church v. Tower Insurance*, 2003 WI 46, 261 Wis. 2d 333, ¶51, 661 N.W.2d 789 (quoted source omitted). Importantly, however, "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." *Trinity*, 2003 WI 46, ¶56.

With respect to factual findings, appellate courts also owe constitutional deference to the factual findings made by the jury. As the United States Supreme Court noted in *Cooper Indus. Inc. v Leatherman Tool Group, Inc.*: "[N]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damage award, to disregard such jury findings." 532 U.S. 424, 439 n.12 (2001).

As it did before the court of appeals, First American's appellate brief presents many misleading factual arguments, all but ignoring the appropriate standard of review that requires the evidence be viewed in the light most favorable to the verdict. *Trinity*, 2003 WI 46, ¶56.

B. Due Process Review of the Punitive Damages Award Under Wisconsin Law.

The parties agree that, for purposes of this dispute, the due process clauses of the Wisconsin Constitution and

United States Constitution are essentially the same. (F.A. Br. 10, n.2) (quoting *County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373, 393-94, 588 N.W.2d 236 (1999)).

This Court has explained that it employs a similar test in reviewing due process challenges to a punitive damages award to the one the U.S. Supreme Court developed. *Trinity Evangelical Lutheran Church v. Tower Insurance*, 2003 WI 46, 261 Wis. 2d 333, ¶51, 661 N.W.2d 789:

> [I]n determining whether an award of punitive damages is excessive, the United States Supreme Court has applied a three-part test. The test asks the reviewing 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. …
>
> When applying a virtually identical test, Wisconsin courts have been encouraged to consider, from the following, those factors which are most relevant to the case, in order to determine whether a punitive damages award is excessive:
>
> 1. The grievousness of the acts;
> 2. The degree of malicious intent;
> 3. Whether the award bears a reasonable relationship to the award of compensatory damages;
> 4. The potential damage that might have been caused by the acts;

5. The ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; and
6. The wealth of the wrongdoer.

Id., ¶¶52-53 (quoted sources omitted).[10]

This case is aggravated by First American's intentional misrepresentations about the evidence it found from its coverage investigation, but it otherwise presents a similar scenario to the one presented in *Trinity*. Both involved an insurance company taking a completely baseless and intransigent position in denying coverage to its insured and causing its insured substantial damage exposure.

Of the six potential factors to consider, the Court in *Trinity* focused on the degree of reprehensibility of the defendant's conduct, the disparity between the potential harm suffered by the insured and the punitive damage award, and comparison of the punitive damages award to the civil or criminal penalties that could be imposed for

[10] First American's brief erroneously describes both tests, calling the U.S. Supreme Court test "Wisconsin's three large factors" test and then characterizing Wisconsin's six-factor test as one merely "to consider in measuring the egregiousness of the party's conduct." (F.A. Br. 22-23). Both the federal and state tests were developed to assist in reviewing the entire punitive damage award and *Trinity* described them as "nearly identical." *Id.*, ¶53.

comparable conduct. *Id.*, ¶¶57-69. A similar analysis is warranted here.

The jury's award in this case can hardly be characterized as clearly excessive, particularly when one considers the reprehensible nature of First American's conduct, its malicious intent, the significant potential harm that the Kimbles faced as a result, and First American's significant wealth.

1. First American Lied to the Kimbles, Attempted to Mislead the Jury, and Continues to Misrepresent Facts to This Court

First American does not dispute that, as an insurance company doing business in Wisconsin, it has an implied duty of good faith and fair dealing and is required to investigate properly and evaluate reasonably disputed coverage claims. *Trinity*, 2003 WI 46, ¶54 (citing *Prosser v. Leuck*, 225 Wis. 2d 126, 138, 592 N.W.2d 178 (1999)). Clearly, Wisconsin has a legitimate interest in deterring insurance companies like First American from engaging in acts of bad faith. Just as this Court concluded in *Trinity*:

> [t]he $1,000,000 punitive damages award against [First American] will serve the legitimate state interest in deterrence, as well as in punishment. Consequently, the punitive damages award will send a message not only to [First American], but to other insurance companies as well, that ignoring its duties as an insurer is not acceptable and might very well result in substantial punitive damages.

Id., ¶54.

"[S]ome wrongs are more blameworthy than others and the punishment should fit the crime." *Jacque v. Steenberg Homes, Inc.*, 209 Wis. 2d 605, 628, 563 N.W.2d 154, 164 (1997). In addressing the grievousness or reprehensibility of the defendant's conduct, courts should consider whether the defendant engaged in deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive. *Warren v. American Family Mut. Ins. Co.*, 122 Wis. 2d 381, 387-88, 361 N.W.2d 724 (Ct. App. 1984); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1599-1600, 134 L.Ed.2d 809 (1996).

But the reader of First American's brief would be hard-pressed to tell what this case is about. First American never forthrightly acknowledges that it

blatantly misrepresented the facts showing that the Kimbles lacked access rights in denying their claim. The evidence showed that First American was aware of the relevant deeds showing a lack of access, that the Kimbles' otherwise valuable home lacked a right of access, and that the Kimbles lost a bona fide $1.3 million sale as a result. The evidence also shows that First American withheld the true title evidence and misrepresented it to its insured in order to avoid a policy limit claim.

Yet First American proclaims that this Court should set aside the punitive damage award on grounds that it did nothing wrong. But merely saying so does not make it true. When the evidence is viewed in a light most favorable to the jury's verdict, its argument rings completely hollow. *Cf. Trinity*, ¶57 ("The most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct.") (quoting *Jacque*, 209 Wis. 2d at 628, 563 N.W.2d at 164).

There is plenty of evidence showing First American engaged in a pattern of deceit from the time it learned of the Kimbles' claim. First American told the Kimbles it was denying their claim because they had a right of access to the north. It explained that this right purportedly derived from two deeds (the "Anderson deeds"), one from 1956 and one from 1959. But it was impossible for the Anderson deeds to give the Andersons (the Kimbles' predecessors-in-interest) an easement to the north, because the grantor of those deeds had already transferred the land over which the easement purportedly ran to someone else — the Cofrins. *Miller v. Hoeschler*, 126 Wis. 263, 105 N.W. 790, 791 (1905) (holding that grantor cannot convey easement over land he does not own); *see also Wonka v. Cari ex rel. Estate of Bierbrauer*, 2001 WI App 274, ¶15, 249 Wis. 2d 23, 30, 637 N.W.2d 92, 96 (holding that grantors cannot convey interest in property they do not own).

Schenker misrepresented the facts of title in asserting that these Anderson deeds gave the Kimbles a

right of access to their land in order to justify denying their title claim. (R.122:56-60, 63; R.85, Ex. 100; R.App. 27-28). He knew that the easement references in the Anderson deeds were invalid in light of the Cofrin deed, but wrote directly the opposite to Attorney Smith in March 2008. (*Id.*) He never mentioned the Cofrin deed at all. (*Id.*)

By trial, Schenker's files had been subject to discovery and he was forced to admit that he intentionally chose never to inform the Kimbles about the Cofrin deed. (R.120:78; R.122:90-96). Schenker even directed his agent to withhold suggested further inquiry into the title problems. (R.122:123, R.85, Ex. 119). The trial record showed that, if he had directed the agent to look further, there was additional evidence confirming the Kimbles lacked access waiting to be discovered in the chain of title among other county resources. (R.122:66; R.120:97; R.85, Ex. 107; R.122:73; R.122:247; R.App. 29).

The jury had plenty of evidence of reprehensible conduct, including that Schenker had been untruthful

and that First American knowingly withheld material evidence and provided misleading information while wrongly denying the Kimbles' claim. (R.123:19-20; R.122:56-60, 63; R.85, Ex. 100; R.120:78; R.122:90-96). First American's continued unwillingness to acknowledge the facts should not avail it here.

First American's distortion of the facts continues even in this Court. At page 44 of its brief, First American states:

> First American's statement of policy coverage did not waffle or change over time. The Policy covers a 'right of access.' It does not cover a trespass, which is entry on land without a right. ... The policy does not assure that the access path has been improved with a road or crosses passable terrain. … The Stevensons produced no cases suggesting that First American's coverage position was incorrect or taken in bad faith.

This is deeply disingenuous. This case does not turn on the location or condition of the access path to the Kimbles' property. There was no access path to the Kimbles' property. First American obfuscated that fact at trial and it continues its similar efforts now.[11]

[11] First American misrepresents that the trial court and "[the court of appeals] also did not declare the Kimble property to be landlocked." (F.A. Br., p.28.) To the contrary, after reviewing and hearing the evidence, the trial court specifically found there was no

Another example of First American's continued misleading arguments to this Court is its effort to deny Schenker was even handling a claim:

> [The Respondents] continue to seek to mislead this Court, by referring to Schenker as First American's 'long-time claims handler.' … This Court should not consider Schenker's conduct in deciding if First American acted reprehensibly in handling a claim.

---

access as a matter of fact and law. (R.120:137-45.) The court of appeals explicitly agreed. (Slip. Op., ¶3) ("The Kimble property is land and water locked."). First American not only refuses to acknowledge the prior courts' rulings, but it continues to misrepresent the facts showing lack of any access even before this Court.

First American also falsely represented to this Court that "Idlewild Woods Drive, borders the Property on the South boundary." (Petition, p.12). However, there is an obvious gap consisting of Land Concepts' private property that is not included within the publicly dedicated drive, which happens to be a full 25 feet. (R.85, Ex. 45). Indeed, Schenker admitted as much at trial:

> Q: So in order to, as you said, even if [Idlewild Woods Drive] could be opened, cleared, developed or used in some way to grant them a right of access, [the Kimbles] would still have to cross Land Concepts' property for 25 feet to get to that publicly dedicated town road that's never been developed, correct?
>
> A: That's correct.

(R.120:53; *see also* R.122:113).

First American's brief offers various other misleading comments suggesting the Court overlook similar evidence. But it is obvious to a land owner and should have been obvious to First American that "one who is forced to trespass upon another's property in order to access a street has no right of access." *Surety Savings & Loan Assoc. v. State*, 54 Wis. 2d 438, 444, 195 N.W.2d 464 (1972).

(F.A. Br. 30). This is completely false. In response to First American's own lawyer's questioning, Schenker clearly testified that he had been "handl[ing] claims for 15 years" when he first learned about the Kimbles' problems with their property and that he was handling claims at that time. (R.122:244) (emphasis added).

At trial, First American tried to characterize the situation as an "inquiry for information," but the jury was entitled to find that explanation a convenient after-the-fact mischaracterization of what truly happened. (R.120:48, 66-68, 79, 108, 235; R.122:22, 44-45, 86, 109, 118, 144-45, 159, 222, 244; R.85, Ex. 104, 105). The finding was well supported by the testimony and various claim correspondence submitted as evidence.

The jury's conclusion is also supported by the fact that Schenker even went to the trouble of sending the Kimbles two formal notices required for a title insurer to deny a "claim" pursuant to WIS. STAT. § 631.28 and Wis. Admin. Code Ins § 6.85(5)(c). (R.85, Exs. 44, 120). First

American's misleading arguments to this Court fail to address or even acknowledge any of this evidence.

First American also still maintains that it did not change its coverage position as it continued to try to justify denial of responsibility. However, First American changed its position so many times that, leading up to trial, it was advancing the position that it owed no coverage to the Kimbles because they could access their land "by water."[12] (R.122:111-12).

In any event, the court of appeals correctly analyzed each of the arguments First American actually advanced at trial even though First American had not raised them when it initially denied coverage. *Kimble v. Land Concepts, Inc.*, No. 2011AP1514, unpublished slip op., ¶¶21-27 (Dec. 3, 2012). The correct conclusion reached was that it had no basis to deny coverage. And, unlike the insurer in *Trinity* which eventually accepted

[12] At trial, First American offered another new theory of easement by implication (R.120:78-79), which the Kimbles and Stevensons debunked (R.122:66; R.120:97; R.85, Ex. 109; R.122:73; R.122:247; R.App. 29; R.122:76; R.85, Ex. 51; R.122:71-73).

responsibility and paid the claim, First American *never* changed its mind and accepted responsibility.

2. First American's Malicious Intent Was Evident From Proof It Hid Evidence From the Kimbles.

Stubborn and baseless denial of coverage is one thing. But the degree of First American's malicious intent against the Kimbles warrants further attention in this case.

First American admitted at trial that title agents and title insurance companies generally have a specialized expertise in reviewing and interpreting the meaning of real estate records and title evidence. (R.122:9). This provided the means by which First American could exploit the Kimbles.

In fact, Schenker acknowledged that real estate attorneys often consult and rely on title insurance agents and title specialists, particularly like himself, for help in researching title and interpreting the meaning of its evidence. (R:122:10).

First American knowingly exploited just that advantage here. First American, through Schenker, knew that the Kimbles were vulnerable as they were in the midst of trying to sell their house when the letter explaining they lacked access was sent to their realtor. "[T]here are few title problems that are more palpable than complete lack of access to a public road." *Stewart Title Guar. Co. v. West*, 110 Md. App. 114, 138-39, 676 A.2d 953 (Md. Ct. App. 1996).[13]

---

[13] Title insurance policies are subject to the same rules of construction as are generally applicable to insurance contracts. *First Am. Title Ins. Co. v. Dahlmann*, 2006 WI 65, ¶24, 291 Wis. 2d 156, 715 N.W.2d 609. Insurers have the advantage over insureds because they draft the contracts. An insurance policy is construed according to what a reasonable person in the position of the insured would have understood the words to mean. *Id.*

A title defect includes "a claim or interest that is inconsistent with the title purportedly transferred." *First American*, 291 Wis. 2d 156, ¶14.

Title insurers have a duty to take prompt action to defend and clear an owner's title when a defect becomes known "since resale value will always reflect the cost of removing the lien." *Blackhawk Production Credit Asps' v. Chicago Title Ins. Co.,* 144 Wis. 2d 68, 78, 423 N.W.2d 521 (1988).

First American's policy promised to insure against loss or damage sustained by reason of four areas of coverage, two of which were at issue in this case:

…

3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

Even as the Kimbles' lawyer consulted with Schenker on the access and marketability problem, Schenker continued to misrepresent that the deeds he had located guaranteed access to the north. (R.122:93-96).

While Land Concepts threatened to close the Kimbles' drive, First American sent the Kimbles on a wild goose chase to install a new driveway to the north and to try to pressure Land Concepts into negotiating. (R.122:93-97; R.85, Exs. 112, 123). During this entire time, First American withheld the truth and instead chose to focus on defending its own actions at all costs.

The seriousness of lying about known material facts, particularly peculiar facts First American had a unique ability to understand, in order to avoid coverage registers at the highest level on the scale of grievousness. *Warren*, 122 Wis. 2d at 387-88, 361 N.W.2d 724 (Ct. App.

> The company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

(R.App. 05; R.85, Ex. 43).

1984) (Though not required as a separate element of awarding punitive damages upon a finding of bad faith, the "suggestion of dishonesty" is the classic equivalent of bad faith).[14]

Moreover, it is clear from many comments in First American's brief that, if the punitive damage verdict is not upheld, its willingness to disregard its duty of good faith to its insured will continue. For example, it argues:

---

[14] First American questions why there was no "special interrogatory asking if the jury found First American to have acted maliciously or with reckless indifference." (F.A. Br., p.27). But First American never asked for an additional question on the verdict. Indeed, in effect, a special interrogatory was given because the trial court specifically instructed the jury about the difference between conduct that constitutes bad faith and conduct that warrants an award of punitive damages. (R.122:322:27). The jury was instructed that punitive damages required it to find "that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." (R.122:325-27). First American has never claimed that the trial court's instructions were not an accurate recitation of the law. In order to accept its claim of substantial prejudice, one would have to assume that the jury did not understand or chose to disregard the instructions from the court. Arguments premised on pure speculation about misconduct or misunderstanding by an adequately instructed jury have never been recognized as a sufficient basis for challenging a jury's factual findings on appeal. On appeal, a court cannot engage in speculation with regard to whether the jury understood or followed the instructions from the trial court. In fact, the appellate court must assume that the jury understands and follows all of the instructions that it receives. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Speculation that the jury "didn't understand or didn't listen to the jury instruction" or that the jury "may or may not have been sidetracked" is not sufficient to overturn the factual findings by the jury. *Burch v. American Family Mutual Insurance Company*, 198 Wis. 2d 465, 477-78, 542 N.W.2d 277 (1996).

> On the one hand, [the Respondents] assert that First American did not locate enough real estate records. On the other, they say that it 'withheld the information' that it did obtain about the Cofrin deed. Pet.Resp. p. 22. Which is it? … [A] claim investigation is adequate if the insurer reviews enough information to make an informed coverage decisions. The Stevensons do not identify any public record that First American failed to obtain that affected policy coverage or that would have changed its coverage analysis.

(F.A. Br. 40). As the passage above illustrates, First American still does not get it. The answer to First American's question is "***both***." It both misrepresented the known facts of land access and it refused to look at any further available evidence.[15] In using these tactics for the purpose of avoiding "a real big claim on the policy" (R.122:86; R.81:152), First American's conduct shows a degree of maliciousness warranting the imposition of substantial punitive damages.

[15] The Stevensons and the Kimbles introduced several specific pieces of evidence that were readily available to First American to further show the property lacked a right of access, including without limitation the Cofrin Affidavit in the chain of title and aerial maps in the county records. (R.122:66; R.120:97; R.85, Ex. 109; R.122:73; R.122:247; R.App. 29; R.122:76; R.85, Ex. 51). None of this would have been needed because First American already had the Cofrin deed, but it all confirmed the complete lack of access.

3. The Jury's Award of Punitive Damages was Reasonable Given its Relation to the Actual or Potential Harm First American Exposed the Kimbles

The next factors to consider are comparing the award to the actual and potential harm caused the insured. *Trinity*, 2003 WI 46, ¶63. *Trinity* reaffirmed the longstanding rule that the jury is entitled to consider the potential harm caused by the insurer's bad conduct, particularly where subsequent disconnected and fortuitous events limit the insured's actual damages. *Id.*

Not only does First American fail to acknowledge its reprehensible conduct, it also grossly understates the actual and potential harm to which its conduct exposed the Kimbles. According to First American, the only actual or potential damage in this case was the $29,738.49 paid for attorneys' and surveyor fees actually incurred by the Kimbles, resulting in a 33:1 punitive damage ratio.

However, at trial, both parties were given the opportunity to introduce evidence and argument on this issue. While First American argued that the only

potential damage in this case was attorneys' fees incurred,[16] the Kimbles sought compensatory damages totaling nearly $100,000 (out of pocket surveyor expenses and attorneys' fees, real estate taxes and mortgage interest expenses incurred after losing the $1.3 million home sale) and showed they faced potential damages far exceeding their policy limits.[17]

The jury rejected First American's position and agreed that the potential exposure was higher because First American could have succeeded in its scheme to escape liability under its insurance contract and Land Concepts may have forever resisted settling in order to squeeze the Kimbles out of the property.

It was undisputed at trial that the Kimbles' $1.3 million home was virtually unsaleable without land access. When one considers the evidence of potential injury in a light most favorable to the verdict, it is clear

---

[16] (*See, e.g.*, R.122:369-71).

[17] (*See, e.g.*, R.121:204-09). At page 53 of its brief, First American misrepresents that a chart in trial exhibit 115 was "shown to the jury" before certain numbers were taken out. That is false. (R.121:204-10).

that the ratio to the punitive damage award is closer to an even ratio.[18] The trial court clearly recognized this in explaining why he was affirming the punitive damage award. (R.123:27-30).

Indeed, First American itself added to the support with evidence from which reasonable inferences could be drawn in support of the high exposure the Kimbles faced. Under cross examination, Schenker admitted that he knew the risk of wrongly denying the Kimbles' claim in 2008: "then they would have had a real big claim on the policy … ." (R.122:86; R.81:152). The Kimbles had a $1.3 million home to which they had no marketable title.[19] As

---

[18] The ratio would be 3:1 even if only considering First American's $370,000 policy limit, which First American acknowledged it faced the prospect of having to pay due to the Kimbles' loss if it had accepted the claim.

[19] First American's sporadic references to estoppel, superseded pleadings, or prior statements are of no moment and were certainly of no aid to its insureds. As was the case before the court of appeals, all these arguments come with no citation to any authority as well. Judicial estoppel applies when a party convinces the court of one position only to reverse course and argue the opposite. *See, e.g.*, *Sands v. Menard, Inc.*, 2013 WI App 47, ¶41, 347 Wis. 2d 446, 471, 831 N.W.2d 805, 818. That never happened here. It is especially true where the pleadings in question were superseded. *Holman v. Family Health Plan*, 227 Wis. 2d 478, 484, 596 N.W.2d 358, 361 (1999) ("[A]n amended complaint supersedes or supplants the prior complaint. When an amended complaint supersedes a prior complaint, the amended complaint becomes the only live, operative

Schenker explained, First American, which had insured marketability of the Kimbles' title, could have tried to deal with that problem in one of three ways: establish access through litigation, buy access through a settlement, or pay the Kimbles up to the limits of the policy. (R.122:78, 81; R.81:134-36).

Since no instrument of record gave the Kimbles a right of access to their property, the first option held little appeal. And with the Kimbles having no legal right to access their $1.3 million home, Land Concepts was in a position to extort a large settlement. First American's policy had a limit of $370,000, and under the circumstances, First American recognized its best option could very well have been to pay the full amount — either as part of a settlement with Land Concepts, or as a "pay-and-walk" if no settlement could be reached (in which case the Kimbles would have had a substantial uncovered loss).

---

complaint in the case[.]"). First American also waived these undeveloped arguments by never even raising them before the trial court either.

Schenker himself admitted that the property had such a high value that First American faced the prospect of having to "pay" its policy limits and "walk", if Land Concepts had been unwilling to work out a deal. (R.122:82-86; R.81:134-36, 151-52). And Land Concepts *was* unwilling to work out a deal. It was undisputed at trial that despite every effort the Kimbles were unable to work out a deal with Land Concepts for more than two years, during which time they lost the sale of their home and faced the prospect at any time of being unable to leave or return home. Thus, in a very real sense the $370,000 value of the policy approximated the real harm the Kimbles actually experienced due to First American's repudiation of its obligations under the policy.

First American, of course, chose none of its three options Schenker identified, instead choosing to deny coverage in bad faith. In truth, First American can offer no defense of the way it handled the Kimbles' claim. Instead, it tries to obfuscate everything. The centerpiece of First American's brief is its argument that the punitive

damages award is excessive because it represents a 33:1 multiplier over the actual compensatory damages that the Kimbles recovered. But this misses the mark for two primary reasons.

First, "Wisconsin law expressly rejects the use of a fixed multiplier, either a fixed ratio of compensatory to punitive damages or of civil or criminal penalties to punitive damages, to calculate the amount of reasonable punitive damages." *Trinity*, 2003 WI App 46, ¶63.

Second, insofar as "comparison" of compensatory and punitive damages is appropriate, *id.*, the potential harm that the insured faced as a result of the insurer's bad faith also warrants consideration:

> Punitive damage is given on the basis of punishment to the injured party not because he has been injured, which injury has been compensated with compensatory damages, but to punish the wrongdoer for his malice and to deter others from like conduct. Punitive damage ought to serve its purpose. Consideration should be given to the wrongdoer's ability to pay and the grievousness of his acts, the degree of malicious intention, and potential damage which might have been done by such acts as well as the actual damage.

Malco, Inc. v. Midwest Aluminum Sales, Inc., 14 Wis. 2d 57, 66, 109 N.W.2d 516, 521 (1961) (emphasis added); *see*

also TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993) ("While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to the respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme.").

Trinity illustrates this proposition. The insurer in *Trinity* initially refused to backdate non-owned automobile coverage for its insured despite clear evidence that the lack of such coverage resulted from an error by Trinity's agent. Even before being sued for bad faith, however, the insurer did agree to backdate coverage and paid the entire $490,000.00 that the insured was liable for. *Id.*, ¶18. The actual damages awarded as a result of the insurer's bad faith were only $17,570.00. *Id.*, ¶105. Nevertheless, the jury awarded $3.5 million in punitive damages. *Id.*, ¶20.

This Court held that $490,000.00 (the potential damage had the insurer persisted in its refusal to

backdate), rather than $17,570.00 (the actual damages resulting from the insurer's bad faith) constituted the compensatory damages number that would be used as a comparison point in evaluating the punitive damages award. *Id.*, ¶¶63-65. The Court went on to uphold a $3.5 million punitive damages award as appropriate and constitutional, *id.*, ¶65, notwithstanding that this was a 200:1 ratio to the actual damages suffered.[20]

The United States Supreme Court upheld an even higher ratio of compensatory damages to actual damages in *TXO.* That case, like this one, involved a somewhat complicated dispute over rights in land, which ultimately boiled down to money. TXO Production Corp. entered into an agreement to extract oil and gas under land owned by Alliance Resources Corp., in exchange for

---

[20] First American's argument that "unlike *Trinity*, the Kimbles were not forced to defend themselves in a lawsuit. They were the plaintiffs. They were not at risk of having a money judgment entered against them" (F.A. Br. 55) makes no sense. The Kimbles brought the suit because they could not sell their home, Land Concepts was threatening to physically prevent them from accessing their home and they had no other way to seek relief from their sellers and from First American, which had denied coverage. *See also Fahrenberg v. Tengel*, 96 Wis. 2d 211, 291 N.W.2d 516 (1980) (potential harm posed by the defendant's conduct is one of the factors to be considered in the punitive damage question).

royalty payments. *Id.* at 447. TXO later tried—unsuccessfully—to weasel out of the royalty payments by filing a declaratory judgment action, in which it claimed that someone other than Alliance owned the rights to the oil and gas. *Id.* at 448-450. The jury awarded Alliance $19,000 in compensatory damages, comprising the attorney's fees Alliance spent in fending off the declaratory judgment action filed by TXO. *Id.* at 451. The jury also awarded $10 million in punitive damages. *Id.* at 451.

The Supreme Court upheld the award, notwithstanding the 526:1 ratio between punitive and compensatory damages. The Court noted Alliance's argument that its damages would have been between $5 million and $8.3 million had TXO succeeded in weaseling out of the agreement. *Id.* at 461. While the Court considered those figures "exaggerated," it still believed that Alliance had faced a potential "multimillion dollar" loss. *Id.* And that potential, even though never realized, was enough to sustain the punitive damages award. *Id.*

at 462 ("While [*TXO*] stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to [Alliance], in terms of reduced or eliminated royalties payments, had [TXO] succeeded in its illicit scheme.").

In this case, the Kimbles faced a hostile neighbor with the legal right to physical block and cut off access to their $1.3 million dollar home. The potential for an extortionate settlement, or even a complete refusal to settle within the policy limits, was certainly present by the insurer's own admissions. In the face of that dire situation, First American repudiated its obligations under the policy and abandoned its insured. While the potential for hundreds of thousands of dollars in actually paid damages was thankfully never realized, the Kimbles still paid $29,738.49 in out of pocket damages—more than the prevailing parties in *Trinity* and *TXO*. The punitive damage award here, which is significantly lower than in either of those two cases, is not excessive.

Despite First American's suggestion to the contrary, this Court has long rejected the idea that the Wisconsin Constitution or common law reduces the propriety of an award of punitive damages to a mathematical calculation:[21]

> Although the amount of compensatory damages and criminal penalties have some relevancy to the amount of punitive damages and may be factors in determining the reasonableness of the punitive damages award, we have not been willing in the past, and are not willing in this case, to adopt a

[21] Even when just considering actual damages incurred, there is nothing "eye-popping" about the 33:1 ratio First American claims to be shocked about in its brief. Beyond *Trinity*, this Court has sustained double-digit multipliers when only actual damages are considered as part of the ratio equation in several other cases involving only economic loss, *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 557 N.W.2d 67 (1996) (10:1 multiplier for conversion of software); *Jacque* (100,000:1 in an intentional trespass case / $100,000 punitive damage award), as have courts in other states. *Walston v. Monumental Life Insurance Co.*, 129 Idaho 211, 923 P.2d 456 (1996) (26:1 in case involving bad faith by insurance carrier / $3,200,000 punitive damage award); *Notrica v. State Compensation Insurance Fund*, 70 Cal.App.4th 911, 83 Cal.Rptr.2d 89 (Ct. App. 1999) (10:1 in case involving bad faith by State Insurance Fund / $5,000,000 punitive damage award); *Moore v. American United Life Insurance Co.*, 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (Ct. App. 1984) (84:1 in case involving bad faith by insurance carrier / $2,500,000 punitive damage award); *Wetherbee v. United Insurance Company of America*, 18 Cal.App.3d 266, 95 Cal.Rptr. 678 (Ct. App. 1971) (200:1 in case involving claim against health and accident insurer / $200,000 punitive damage award); *Principle Financial Group v. Thomas*, 585 So.2d 816 (Ala. 1991) (750:1 in case involving bad faith by insurance carrier / $750,000 punitive damage award); *Parcelsus Health Care Corp. v. Willard*, 754 So.2d 437 (Miss. 1999) (150:1 and 43:1 for retaliatory discharge of employees); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859, 871 (Ohio 1995) (100:1 for conspiracy to defraud in consumer loan transaction).

> mathematical formula for awarding punitive damages. In punitive damages, as in damages for pain and suffering, the law furnishes no mechanical legal rule for their measurement. The amount rests initially in the discretion of the jury. We are reluctant to set aside an award because it is large or we would have awarded less. ... [A]ll that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, see that the results attained do not shock the judicial conscience.

Fahrenberg v. Tengel, 96 Wis. 2d 211, 235-36, 291 N.W.2d 516, 527 (1980) (internal quotation marks omitted).

This firmly-rooted common law rule has made sense. It does not take much imagination, and even less real world experience, to realize that only a small percentage of insureds, deceived by their insurers, are likely to have the gumption and the wherewithal to go to court to fight for their contractual rights. The problem becomes arguably insurmountable if an insurer can avoid any punishment just as long as it decides to eventually come around when an insurer shows enough moxie or independent good fortune eventually solves the problem. Hence, focusing solely on actual harm in the context of insurance bad faith would defeat the deterrent effect of punitive damages. Here, when one focuses on the

potential harm to the Kimbles, it is clear that the jury's verdict comports with Wisconsin law and Constitutional Due Process.

4. The Jury's Award of Punitive Damages was Reasonable in Context of the Potential Civil or Criminal Penalties

The next factor involves comparison of the punitive damage award to possible civil or criminal penalties. *Trinity* recognized that Wisconsin provides a criminal penalty, including a fine of up to $10,000, for violations of the same insurance statutes and rules First American violated in this case. *Trinity*, 2003 WI App 46, ¶68. Wis. Admin, Code Ins. § 6.11(3)(a) "defin[es] certain claim adjustment practices which are considered to be unfair methods and practices in the business of insurance." Subdivision (9) of the code provides:

> Except as may be otherwise provided in the policy contract, the failure to offer settlement under applicable first party coverage on the basis that responsibility for payment should be assumed by other persons or insurers.

Each time that First American tried to argue that its conduct should be excused because the sellers of the

property also had responsibility for the title problem or misrepresented the facts showing a lack of access, First American engaged in conduct this Court has determined meets consideration under the fifth factor. *Trinity*, 2003 WI App 46, ¶68.

Indeed, Wisconsin case law confirms the title insurer's duty to take immediate action to defend and clear an owner's title when a defect becomes known. *Blackhawk Production Credit Asps' v. Chicago Title Ins. Co.,* 144 Wis. 2d 68, 78, 423 N.W.2d 521 (1988). Other courts have tried to explain this rule to First American, but it still has not gotten the message. *Summonte v. First American Title Ins. Co.*, 184 N.J. Super. 96, 445 A.2d 409 (1981), affirming *Summonte v. First American Title Ins. Co.*, 180 N.J. Super. 605, 436 A.2d 110, 115-16 (N.J. Super. 1981). First American cannot be permitted to play down the seriousness of engaging in unfair claims adjustment practices in this state.

5. The Jury's Award of Punitive Damages was Reasonable in Light of First American's Considerable Wealth

With respect to the final Wisconsin factor, First American all but concedes its considerable wealth supports the award. (F.A. Br. 49). After all, First American's gross revenue was over $2 billion and net profits were $65 million in just the year 2010. (R.122:175). In terms of showing First American's ability to pay the punitive damage award, there was simply no reason why extensive further evidence would be required beyond what First American readily acknowledged.

Yet First American now argues the Kimbles and Stevensons should have presented *more* evidence about its considerable wealth. But this makes no sense. First, it never objected at trial. Second, the decision not to further emphasize and belabor this point should have been to the Kimbles' and the Stevensons' credit instead of being used by First American to now question why an expert was not called to further expound on its vast holdings and trumpet that its coffers were overflowing.

Other than bemoaning the lack of in-depth financial analysis given to its considerable revenues and profits, First American's brief all but concedes the sixth factor under Wisconsin's test is easily met. While it acknowledges its enormous size, it seems to suggest counsel somehow misled the jury by arguing that this case "doesn't mean anything" to First American in closing arguments. However, First American fails to cite a single case suggesting that this argument was somehow improper, particularly where the evidence supported the argument. And, respectfully, if First American had wanted to give anyone a different impression it should have accepted responsibility to the Kimbles at some point in time. That simply never happened.

To the contrary, First American seeks to garner sympathy using a wide range of distortions. On the less significant scale, it argues without citation to the record that the Kimbles were not financially vulnerable, when Mrs. Kimble testified directly to the contrary. (R.121:182, 189, 192-93). It claims the jury was out for deliberations

for one half hour, which is untrue and irrelevant.[22] It speculates that the jury may have been confused by the trial court's rulings on coverage, but it does not explain how that could be so, why this Court should consider it given that it never objected at trial, or why it should matter since it actually insisted those rulings be made by the circuit court prior to trial. (R.110:22, 68-72; R.111:17-19; R.120). None of these distortions change the facts: First American misled and abandoned its insureds despite knowing full well that they lacked access to their home.

C. 2011 Act 2, WIS. STAT. § 895.043(6) is No Reason to Depart From Considering Potential Harm and Affirming this Punitive Damage Award.

Despite the fact that WIS. STAT. § 895.043(6) was not even enacted until years after its egregious conduct occurred and this case was filed, First American still argues it should be applied here anyway to limit the punitive damage award. (F.A. Br. 51) ("The ratio

[22] First American argued that the jury returned a verdict within one hour in its late-filed post-verdict motion (R.90:13).

explicitly adopted in the statute must serve as at least a benchmark for the ratio that passes constitutional muster in this case."). This argument represents a grasping for straws, and there are several good reasons it should be rejected.

As an initial matter, First American never raised this argument before the trial court. One of the long-standing limitations on appellate review is the general refusal of appellate courts to consider issues raised for the first time on appeal. *See, e.g.*, *Shadley v. Lloyds of London*, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. The party alleging error has the burden of establishing, by reference to the record, that the error was first raised in the circuit court. *Id.*, ¶26. Alleged errors must be raised timely and with particularity in post-verdict motions if they are to be raised as of right on appeal. *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

Of course, First American filed its post-verdict motion challenging the verdict on due process grounds

late, but this is an additional reason why the argument under § 895.043(6) should be rejected.

Even if First American had properly raised the issue below, however, the argument should still be rejected as lacking any merit. First, the argument is nonsensical in light of the express terms of 2011 Act 2, which state that the statute "first applies to actions … that are commenced" on or after February 2, 2011. 2011 Act 2, ¶45(5).

Finally, First American's argument would also appear to advocate an unconstitutional taking. As the court of appeals noted, First American expressly conceded the validity of the assignment. (Slip. Op., ¶15, citing R.110:21 ("[I]t would be improper for us to raise issues regarding the assignment. I think that we all agree that the Kimbles had the right to assign their claim.")). This Court has long recognized that a plaintiff has a "vested property right" in an existing right of action where the claim has accrued under the rules of the common law or in accordance with its principles, which should not be

lightly diminished by later legislation. *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶31, 244 Wis. 2d 720, 628 N.W.2d 842; *see also Martin v. Richards*, 192 Wis. 2d 156, 201-12, 531 N.W.2d 70 (1995) (retroactive application of cap on noneconomic damages in medical malpractice actions violated due process).

In sum, there is no reason to depart from the common-law rules applicable to due process review of punitive damage awards in this case, especially when the Legislature's enactment of Wis. Stat. § 895.043(6) makes the issue academic in future cases.

CONCLUSION

The jury imposed a reasonable punishment on First American for misleading and abandoning its insureds despite knowing full well that the Kimbles lacked a valid easement giving them access to their valuable home and causing them to lose a $1.3 million sale. Nothing in the Wisconsin Constitution or common law forecloses this result. The decision below should be affirmed.

Respectfully submitted this ___ day of October, 2013.

LAW FIRM OF CONWAY,
OLEJNICZAK & JERRY, S.C.
Attorneys for Defendants-Respondents,
John E. Stevenson and Jane E. Stevenson

By: _____

David H. Weber
State Bar No. 1034009
T. Wickham Schmidt
State Bar No. 1062002

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. §§ 808.10 and 809.62 for a brief produced with a proportional serif font. The length of this Brief is 10,978 words.

LAW FIRM OF CONWAY,
OLEJNICZAK & JERRY, S.C.
Attorneys for Defendants-Respondents, John E. Stevenson and Jane E. Stevenson

By: _____
David H. Weber
State Bar No. 1034009
T. Wickham Schmidt
State Bar No. 1062002

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorneys for Defendants-Respondents, John E. Stevenson and Jane E. Stevenson

By: _____
David H. Weber
State Bar No. 1034009
T. Wickham Schmidt
State Bar No. 1062002

SUPREME COURT OF WISCONSIN

Robert L. Kimble and Judith W. Kimble,
Plaintiffs,

v. Appeal No. 2011AP001514

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-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER FIRST AMERICAN TITLE INSURANCE COMPANY

On Petition for Review of the Decision of the Court of Appeals, District 4

On Appeal from the Judgment and Order of the Door County Circuit Court Case No. 2009CV188,
The Honorable D. Todd Ehlers, Presiding

J. Bushnell Nielsen
WI State Bar ID No. 1014758
Rebecca Leair
WI State Bar ID No. 1003955
Reinhart Boerner Van Deuren s.c.
Suite 1
N16 W23250 Stone Ridge Drive
Waukesha, WI 53188

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265
Telephone: 262-951-4500
Facsimile: 262-951-4690
Attorneys for Defendant-Appellant-Petitioner First American Title Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. There Was No Clear and Convincing Evidence That First American Was Insulting, Cruel, Vindictive or Malicious.

The Stevensons received a $1,000,000 punitive damage award against First American based on their trespass on their neighbor's land. First American did not insure the "right" to trespass or issue a policy to the Stevensons.

The award could only be affirmed if this *de novo* review revealed clear and convincing evidence that First American denied a claim, for no good reason, and did so with active malice, vindictiveness or cruelty. The award must be struck because there was no such evidence.

A. *De Novo* Review Shows That the Award is Not Supported by Clear and Convincing Evidence.

The Stevensons assert that this Court should defer to the jury's findings of fact. Resp. 22. First, however, this Court conducts a *de novo* review of the "constitutional facts" necessary to sustain the punitive damage award. *State v. Garfoot*, 207 Wis. 2d 214, 235, 558 N.W.2d 626 (1997) (Abrahamson, C.J., concurring).

The Stevensons did not produce clear and convincing evidence sufficient for a reasonable jury to find that First American was aware that its conduct was substantially certain to result in the disregard of its insureds' rights. *Wischer v. Mitsubishi Heavy Industries America,*

Inc., 2005 WI 26, ¶ 34, 279 Wis.2d 4, 694 N.W.2d 320, citing *Strenke v. Hogner*, 279 Wis.2d 52, ¶¶ 36, 38, 54, 694 N.W.2d 296.

This jury made no findings for which deference is owed. Its answers to most of the special verdict questions were dictated by the judge's rulings as a matter of law on access, marketability and policy coverage. There were no facts in dispute. The jury was asked if First American acted in bad faith, but was not required to make a credibility determination. It did not hear live testimony from the claim administrator. The Stevensons presented no expert testimony about insurance claim practices.

B. The Stevensons Did Not Prove Aggravation, Insult or Cruelty, Vindictiveness or Malice.

A finding of bad faith alone does not support *any* punitive damage award. Punitive damages are "not necessarily appropriate" if the insurer acted in bad faith. Such an award requires a further showing that the insurer treated its insured with "aggravation, insult or cruelty, with vindictiveness or malice." *Anderson v. Continental Cas. Co.*, 85 Wis.2d 675, 697, 271 N.W.2d 368 (1978).

A *de novo* review of the facts shows that the Stevensons did not come close to proving that First American acted with aggravation, insult, cruelty, vindictiveness or malice. In lieu of proof, the

Stevensons string together insulting accusations about First American: it engaged in a "pattern of deceit," "has not learned its lesson," has taken a "baseless and intransigent position," "still does not get it," "knowingly exploited" its "advantage" of title expertise, its underwriting person "misrepresented" that the North Easement was valid, and similar comments. (Resp. 27-28, 37, 24, 38, 35, 36) These blustery comments are not tied to facts and do not aid this Court in its review.

First, the Stevensons did not prove that the Kimbles submitted a notice of claim or that First American issued a denial. The Kimbles skipped that step by naming First American in this lawsuit without prior notice.

The Stevensons ignore these facts, focusing on Mr. Schenker's actions in 2008. The Stevensons did not prove that Mr. Schenker denied a claim. Mrs. Kimble testified she did *not* think that Mr. Schenker issued a claim denial. (R.121:181)

Rather, when the house was for sale, Mr. Schenker promised to issue a policy to a buyer assuring a right of access. What he would not do, and could not have done prudently, was to insure that there was a

"right of access to and from the Land"[1] over the driveway where built, because no such right existed.

Again, Mrs. Kimble agreed. She told the jury "we tried to get access going to another place, and we asked the title company if they would insure that, and they wouldn't. They said they would insure access, but they wouldn't define where the access was." (R.121:181)

Without a claim notice or denial, the Stevensons' argument is based solely on what they say First American *represented* to the Kimbles in 2008. Resp. 2, 5. Their brief says this petition "presents the question of whether a title insurer" that "conceals … and misrepresents the facts … may be punished with an award of punitive damages… ." Resp. 2. Those so-called facts concern recorded deeds.

A title insurance policy is a contract of indemnity. This Court held long ago that a title insurance policy does not represent the state of title, the title insurer may not be sued for misrepresenting the condition of title, and is not required to search title before insuring. This court said in *Greenberg v. Stewart Title Guar. Co.*, 171 Wis. 2d 485, 492 N.W.2d 147 (1992):

---

[1] This phrase is found in Covered Risk 4 of the standard American Land Title Association 2006 form owner's policy used in this state.

> [A] title insurance company is not an abstractor of title employed to examine title. … Thus, the only duty undertaken by a title insurance company in issuing a policy of insurance is to indemnify the insured up to the policy limits against loss suffered by the insured if the title is not as stated in the policy.
>
> * * * *
>
> Any search done by an insurer in preparation for preparing a title commitment is done to protect itself in deciding whether to insure the property and to protect against losses covered in the policy.

This Court quoted this statement with approval: "A title policy is not a summary of the public records and the insurer is not supplying information; to the contrary he is giving a contract of indemnity." *Lawrence v. Chicago Title Ins. Co.*, 192 Cal. App. 3d 70, 74-75 (1987).

Since a title insurance policy is not a representation about title, neither is an offer to issue such a policy. An offer of insurance is a promise, not a representation. Such an offer is a promise of future performance that may ripen into a contract. *McLellan v. Charly*, 2008 WI App. 126, ¶ 21, 313 Wis. 2d 623, 758 N.W.2d 94. A promise of future performance is not a misrepresentation of existing fact unless the promisor had no intent to carry out the promise when made. *Consolidated Papers, Inc. v. Dorr-Oliver, Inc.*, 153 Wis. 2d 589, 594, 451

N.W.2d 456 (Wis.App. 1989); *U.S. Oil Co., Inc. v. Midwest Auto Care Services, Inc.*, 150 Wis. 2d 80, 87, 440 N.W.2d 825 (Wis.App. 1989).

The Stevensons failed to prove that First American denied a claim, lacked a basis for denial, or was cruel, insulting, vindictive or malicious toward its insureds. There was no basis for the punitive damage award.

II. The Kimbles Did Not Face Any Potential Harm That Supports the $1,000,000 Punitive Damage Award.

The punitive damage award is also grossly excessive, because there is no potential harm that would rationalize the ratio of 33 to 1 between compensatory and punitive damages.

A. The Mueller Contract Amount Does Not Represent Potential Harm.

The Stevensons ask this Court to uphold the $1,000,000 punitive damage award based on "potential harm" to the Kimbles from a sale contract the buyers terminated because there was no easement for the trespassing driveway. Resp. 39-51.

That contract price was not potential harm. The Kimbles did not lose their home when the sale contract was terminated. They also had no right to trespass. The Kimbles would not have been legally

harmed if Land Concepts had obtained a court order enjoining their trespass.

The Muellers would not buy because the Kimbles could not procure a title insurance policy insuring a right to use the driveway, because none existed. Resp. 16. Title insurance is not trespass insurance. The policy insures valid interests in real estate. There was no insurable "right" in the trespassing cutoff driveway.

Nonetheless, First American agreed in March of 2008, when the trespass issue arose, to issue a policy to a buyer insuring that the property had a right of access. The Mueller contract was not signed until nearly a year later, in January of 2009. (R.85 Ex. 113)

Between March, 2008 and January, 2009, the Kimbles and Stevensons did not obtain an easement or build a driveway in the correct location. This inactivity was apparently induced by the Stevensons' counsel. Mrs. Kimble testified that, during the summer of 2008, the "Stevensons' attorney is saying, 'There is no problem. Don't worry about anything.'" (R.121:182) Only *after* the Muellers demanded an easement did the Kimbles try to negotiate one. Resp. 16.

The value of the Kimble property is not "potential harm" that supports the award. The property was an asset, not a liability, and the

Kimbles did not lose the land. The Stevensons introduced no expert testimony that the property had less value before an easement was obtained for the cutoff driveway. The Stevensons allude to three indications of value: the Kimbles' 2004 purchase price of "approximately $355,000," the 2008 tax assessed value of $629,000 and the 2009 Mueller contract amount. Resp. 8, 15. Those numbers do not prove harm. They are indicators (if not proof) of the property's value *while the driveway trespassed*. There is nothing connecting the value of the property to any potential harm faced by the Kimbles.

In any event, the Stevensons are barred from asserting the Mueller contract price as potential harm. They did not list that amount on the chart of "potential damages" they showed the jury. The jury's verdict cannot be supported by a theoretical harm not presented to the jury.

B. The Possibility of an Extortionate Demand Was Not Potential Harm.

The Stevenson assert, as an alternative theory of potential harm, that Land Concepts *might have* demanded an extortionate amount for an easement. Resp. 42, 48. The Stevensons have waived this argument, which was not presented below.

This argument also was not presented to the jury. The jury heard nothing about settlement negotiations with Land Concepts because the Stevensons succeeded in excluding that evidence. (R.121:162-163) The Stevensons' counsel fought the introduction of any such evidence. (R.121:169-170) The Stevensons' counsel tiptoed all around the cost of buying the easement without eliciting testimony on it. (R.121:203, 209) Having demanded that this evidence be excluded, the Stevensons may not now use it to try to prop up the jury verdict.

Even if this Court considered this new argument, it does not support a $1,000,000 award. There was no extortionate demand. The evidence of the actual and potential cost of the easement is in the record.

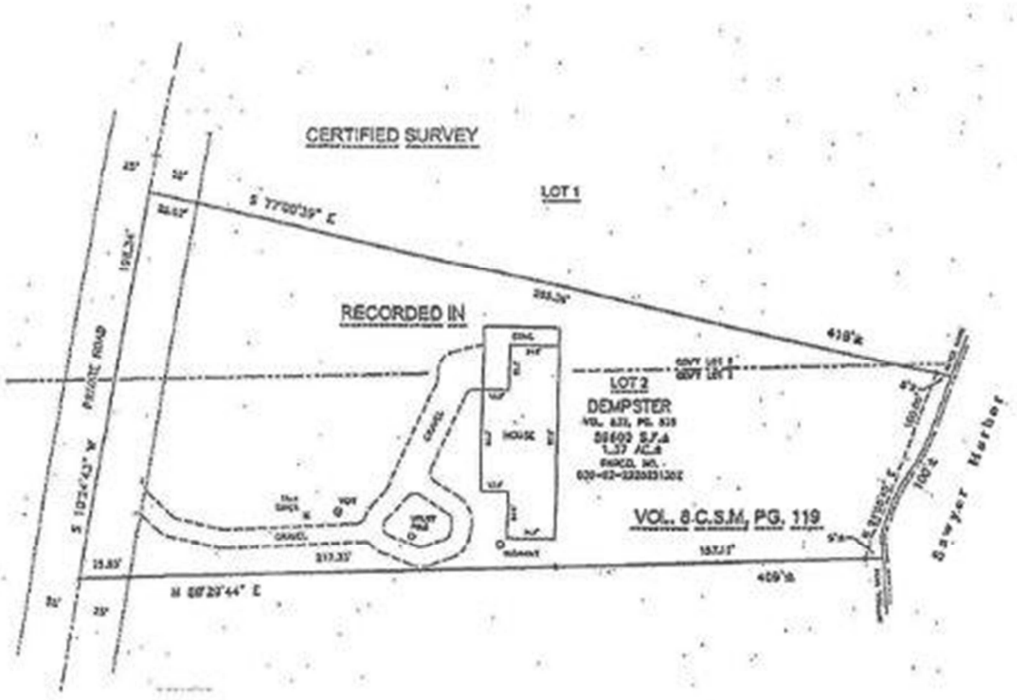
The upper range of the settlement demand was not $1,000,000, but $45,000, about the amount of the compensatory damages. The Kimbles' lawyer said that Land Concepts' lawyer would recommend that his client accept $45,000. He said that, "with a bit of work, we could get him into the mid-30's." (R.85 Ex. 127) The Stevensons paid Land Concepts $40,000, the midpoint in that range. (App. 58, 94-116, R.35, Ex. 3, p. 25)

Also, the Kimbles could have bought an easement for *less* money but for the Stevensons. Mrs. Kimble testified that, when the Muellers demanded the easement, her real estate agent offered to pay a "sizable sum," and $35,000 was offered to Land Concepts. (R.121:195) However, Land Concepts did not give the easement then *because it would also benefit the Stevensons*. She testified that Land Concepts "was never going to help them [the Stevensons], and we [the Kimbles] were going to be a victim of that because of that, because we share the same access." (R.121:196)

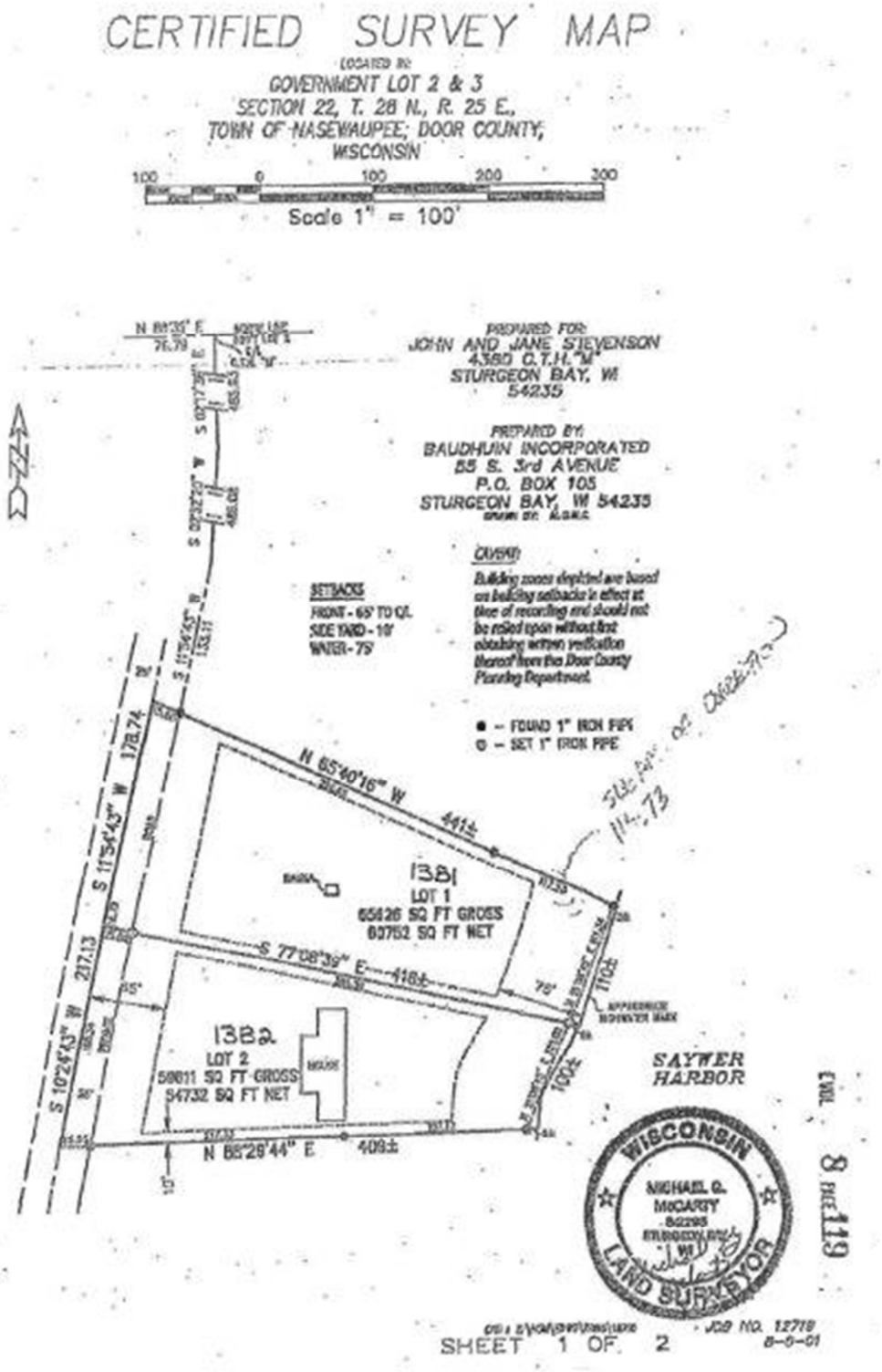
The Stevensons acknowledge that Land Concepts was "unwilling to work out a deal" while the Mueller contract was live. Resp. 43. They do not acknowledge that *they were the reason*. It would pervert justice to permit the Stevensons to collect $1,000,000 based on a theoretical harm to the Kimbles caused by bad blood between the Stevensons and Land Concepts.

Moreover, the Kimbles were not at Land Concepts' mercy. They carefully considered their *other* option—building a driveway in the path of the North Easement. The Stevensons say the Kimbles had a survey done before they purchased "that revealed no problem with

access." Resp. p. 9. That survey shows access by the North Easement, listed as a "private road":



(R.85 Ex. 116) The survey did not show the cutoff road running west, or suggest any right to use it. The Kimble survey corresponded to the Stevenson Certified Survey Map, which also showed the North Easement, not the cutoff driveway:


CERTIFIED SURVEY MAP
LOCATED IN:
GOVERNMENT LOT 2 & 3
SECTION 22, T. 28 N., R. 25 E.,
TOWN OF NASEWAUPEE; DOOR COUNTY,
WISCONSIN
100 0 100 200 300
Scale 1" = 100'
PREPARED FOR:
JOHN AND JANE STEVENSON
4360 C.T.H. "M"
STURGEON BAY, WI
54235
PREPARED BY:
BAUDHUIN INCORPORATED
55 S. 3rd AVENUE
P.O. BOX 105
STURGEON BAY, WI 54235
SETBACKS
FRONT - 65' TO C/L
SIDE YARD - 10'
WATER - 75'
CAUTION
Building zones depicted are based on building setbacks in effect at time of recording and should not be relied upon without first obtaining written verification thereof from the Door County Planning Department.
● - FOUND 1" IRON PIPE
○ - SET 1" IRON PIPE
N 89°35' E
76.79
S 07°17'58" E
S 09°32'20" W
S 11°54'43" W
178.74
S 11°54'43" W
217.13
S 10°24'43" W
N 65°40'16" W
441±
S 77°08'39" E
416±
N 66°29'44" E
409±
1381
LOT 1
65426 SQ FT GROSS
63752 SQ FT NET
1382
LOT 2
58611 SQ FT GROSS
54732 SQ FT NET
BARN
HOUSE
SAYER CREEK
SAYER HARBOR
ORDINARY HIGH WATER MARK
WISCONSIN
MICHAEL G. McCARTY
S-2295
LAND SURVEYOR
VOL. 8 PAGE 119
JOB NO. 12719
8-6-01
SHEET 1 OF 2

Mrs. Kimble testified that, when the trespass issue began, she got Tom Cofrin, the son of the former owner of the Drake property to the north over which the North Easement runs, "to show where he thought there had been access." (R.121:212) Door County gave permission to the Kimbles to place fill on the North Easement path. (R.121:212, 244-245).

Thus, if Land Concepts had demanded too much money, the Kimbles could have reopened the old driveway on the North Easement path. The Stevensons offered no testimony about the cost to place gravel there. The cost of laying 100 feet of gravel does not support the $1,000,000 punitive damage award.

Thus, even if the Stevensons were entitled to raise this new argument, there was no threat of an extortionate demand that would represent "potential harm" supporting the $1,000,000 award.

C. *BMW* and *TXO* Do Not Apply.

The Stevensons suggest this case is like the facts in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). *BMW* is a prime example of an award supported by evidence of a pattern of conduct. In *BMW*, the jury was provided concrete evidence that BMW had sold 900 used cars as new cars, under the same program in which it sold the plaintiff's

car. Simple math showed that the punitive award of $4,000,000 was the $4,000 in compensatory damages multiplied by 1,000, which was very close to the aggregate damage amount for 900 car sales.

The Stevensons produced no evidence that First American engaged in a pattern of wrongful conduct. This punitive damage award cannot be supported by aggregation of wrongful acts.

The Stevensons also try to shoehorn into *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). The size of the *Alliance* award was supported two factors: the large amount of royalties the trickster tried to procure by fraud, and evidence that it had conducted the same fraud on others. TXO tried to renegotiate oil and gas royalties with Alliance based on "a worthless quitclaim deed." 509 U.S. at 443. Alliance introduced expert testimony that the anticipated gross revenue from the oil and gas wells was enormous—between $22.5 million and $37.5 million. 509 U.S. at 451, fn. 10. TXO would have collected a percentage of that revenue as royalties. Alliance also introduced testimony "that TXO had engaged in similar nefarious activities in other parts of the country." 509 U.S. at 443. The Supreme Court held that it was "fair to infer that the punitive damages award of

$10 million was based on" evidence of the huge royalties and TXO's other conduct. 509 U.S. at 451.

First American did not perpetrate a fraud that almost induced the Kimbles into paying large sums of money to it, as in *TXO*. First American did not engage in a pattern of wrongful conduct.

The type of evidence presented in *BMW* and *TXO* is not found in this case. A complete review of the constitutional analysis in those decisions supports First American's request to strike the punitive damage award.

III. Wisconsin's Punitive Damage Capping Law Is Persuasive Evidence that a 33:1 Ratio is Grossly Excessive.

The 33:1 punitive damage ratio is automatically suspect as violating First American's Due Process rights. The cap on punitive damages set by the Wisconsin legislature, at twice compensatory damages or $200,000, whichever is greater, is persuasive evidence that our legislators would find a ratio of 33 to 1 to be grossly excessive. Wis. Stat. § 895.043(6).

The legislature's expression of the limits of a *reasonable* punitive damage award is entitled to some weight. *See Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 45, 295 Wis. 2d 1, 719 N.W.2d 408 (subsequent legislation a crucial component of

constitutional analysis because it shows legislative understanding of earlier amendment); *McGarrity v. Welch Plumbing Co.*, 104 Wis. 2d 414, 427, 312 N.W.2d (1981) (subsequent revision of administrative rule, although not applying to case, accorded weight as aid in determining legislative and administrative intent).

The legislature appears to have acted in response to decisions of this Court, including its long-standing unwillingness to set a bright-line test for excessive awards. *See Green Bay Packaging, Inc. v. DILHR*, 72 Wis. 2d 26, 32, 240 N.W.2d 422 (1976) (legislative inaction after court interpretation of statute is legislature's approval of court's construction).

A subsequent statutory cap on punitive damages, while not binding in the review of a damage award, is the "Legislature's expression" of the appropriate relationship between actual and punitive damages which "must be noticed." *Apache Corporation v. Moore*, 960 S.W.2d 746, 750 (Tex. App. 1997). A court should "note and give consideration to the Legislature's view of appropriate ratios of exemplary damages…as expressed in statutory enactments" although the statute antedates the claim. *Harris v. Archer*, 134 S.W.3d 411, 440 (Tex. App. 2004).

The Stevensons also assert this Court would take their "vested property rights" if it considered the statute to declare the award grossly excessive. The holder of a cause of action has no "vested property right" to take a judgment in an amount that offends the Constitution. In fact, "[n]o cause of action…exists for punitive damages … [and] no person has a right to punitive damages." *Wussow v. Commercial Mechanisms, Inc.*, 90 Wis.2d 136, 139, 279 N.W. 2d 503 (Wis.App. 1979).

IV. Conclusion

First American respectfully requests that this Court strike or reduce the punitive damage award, and deny the Stevensons' motion for summary disposition.

Respectfully submitted this 4th day of November, 2013.

Reinhart Boerner Van Deuren s.c.
Suite 1
N16 W23250 Stone Ridge Drive
Waukesha, WI 53188
Telephone: 262-951-4500
Facsimile: 262-951-4690

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

s/J. Bushnell Nielsen
J. Bushnell Nielsen
WI State Bar ID No. 1014758
bnielsen@reinhartlaw.com
Rebecca Leair
WI State Bar ID No. 1003955
rleair@reinhartlaw.com
Attorneys for Defendant-Appellant-Petitioner First American Title Insurance Company

REINHART/10494386

SUPREME COURT OF WISCONSIN

Robert L. Kimble and Judith W. Kimble,
Plaintiffs,

v. Appeal No. 2011AP1514

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-Petitioner.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and section 809.62(4)(a) for a brief produced with proportional serif font. The length of this brief is 2,999 words.

Dated this 4th day of November, 2013.

Reinhart Boerner Van Deuren s.c.
Suite 1
N16 W23250 Stone Ridge Drive
Waukesha, WI 53188
Telephone: 262-951-4500
Facsimile: 262-951-4690

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

s/J. Bushnell Nielsen
J. Bushnell Nielsen
WI State Bar ID No. 1014758
bnielsen@reinhartlaw.com
Rebecca Leair
WI State Bar ID No. 1003955
rleair@reinhartlaw.com
Attorneys for Defendant-Appellant-Petitioner First American Title Insurance Company

SUPREME COURT OF WISCONSIN

Robert L. Kimble and Judith W. Kimble,
Plaintiffs,

v. Appeal No. 2011AP001514

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-Petitioner.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I certify that I have submitted an electronic copy of this this reply brief that complies with the requirements of Wisconsin Statutes section 809.19(12).

I further certify that the electronic reply brief is identical in content and format to the printed form of the brief filed in this matter. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of November, 2013.

Reinhart Boerner Van Deuren s.c.
Suite 1
N16 W23250 Stone Ridge Drive
Waukesha, WI 53188
Telephone: 262-951-4500
Facsimile: 262-951-4690

Mailing Address:
P.O. Box 2265
Waukesha, WI 53187-2265

J. Bushnell Nielsen
J. Bushnell Nielsen
WI State Bar ID No. 1014758
bnielsen@reinhartlaw.com
Rebecca Leair
WI State Bar ID No. 1003955
rleair@reinhartlaw.com
Attorneys for Defendant-Appellant-Petitioner First American Title Insurance Company

RECEIVED
11-26-2013
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

ROBERT L. KIMBLE and JUDITH W. KIMBLE,

PLAINTIFFS,

v. Appeal No. 2011AP1514

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, and

FIRST AMERICAN TITLE INSURANCE COMPANY,

DEFENDANT-APPELLANT-PETITIONER.

APPEAL FROM A DECISION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT IV,
AFFIRMING THE JUDGMENT OF THE DOOR
COUNTY CIRCUIT COURT,
THE HON. D. TODD EHLERS,
CASE NO. 09-CV-188

NON-PARTY BRIEF OF THE WISCONSIN INSURANCE ALLIANCE, THE WISCONSIN CIVIL JUSTICE COUNCIL, INC., AND WISCONSIN MANUFACTURERS & COMMERCE

Wis. Stat. § (Rule) 809.19(7)

GODFREY & KAHN, S.C.
JAMES A. FRIEDMAN
State Bar No. 1020756
KERRY L. GABRIELSON
State Bar No. 1084845
One East Main Street
Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911

Attorneys for the Wisconsin Insurance Alliance, the Wisconsin Civil Justice Council, Inc., and Wisconsin Manufacturers & Commerce

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Constitutions

STATEMENT OF THE ISSUE

Did the Door County Circuit Court and the Wisconsin Court of Appeals appropriately review the jury's award of punitive damages in this case to ensure that it comports with the due process protections enshrined in the Fourteenth Amendment and the Wisconsin Constitution?

INTRODUCTION

While First American Title Insurance Company ("First American") presents sufficient reasons in its briefs to reverse the decision of the Wisconsin Court of Appeals, the Wisconsin Insurance Alliance ("WIA"), the Wisconsin Civil Justice Council, Inc. (the "WCJC"), and Wisconsin Manufacturers & Commerce ("WMC") (collectively, the "amici") submit this brief to provide the Court with a broader perspective. In particular, the amici ask the Court to: (1) address the ambiguity in the way Wisconsin courts currently analyze punitive damages awards when constitutional issues of due process are raised; (2) harmonize

Wisconsin's treatment of punitive damages awards with U.S. Supreme Court jurisprudence; and, (3) require that the lower court's review of the punitive damages award in this case comport with constitutional due process guarantees under the Fourteenth Amendment and the Wisconsin Constitution. A punitive damages award of thirty-three times the actual compensatory damages simply is "grossly excessive" and unconstitutional for an insurance company's mistaken denial of insurance coverage with no egregious circumstances. Therefore, the amici respectfully request that this Court reverse the decision of the Court of Appeals.

ARGUMENT

I. THE WISCONSIN SUPREME COURT SHOULD FORMALLY ADOPT THE U.S. SUPREME COURT'S PROCEDURE FOR ANALYZING THE CONSTITUTIONALITY OF AN AWARD OF PUNITIVE DAMAGES.

This Court previously has noted that

> [w]hile the language [of the due process clauses] used in the two constitutions [Wisconsin's and the United States'] is not identical … the two provide identical procedural due process protections.

Cnty. of Kenosha v. C & S Mgmt., Inc., 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999). Because punitive damages awards "serve the same purposes as criminal penalties," but a defendant "subjected to punitive damages in [a] civil case[] [has] not been accorded the protections applicable in criminal proceedings," heightened concerns exist "over the imprecise manner in which punitive damages systems are administered." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). The U.S. Supreme Court, accordingly, has "admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property.'" *Id*. Therefore, it is paramount that Wisconsin courts provide at least the same level of due process protection guaranteed by the Fourteenth Amendment to the U.S. Constitution.

A. This Court should clearly and unequivocally adopt *de novo* review as the proper standard to analyze the constitutionality of a punitive damages award.

The U.S. Supreme Court has held that *de novo* review is the proper standard for reviewing the constitutionality of a

punitive damages award to ensure that the award comports with Fourteenth Amendment Due Process protections. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001). In *Cooper*, the Court noted that the Fourteenth Amendment "of its own force … prohibits the States from imposing 'grossly excessive' punishments on tortfeasors," and it makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the states. *Id*. at 433-34.

This Court's prior application of the standard of review to constitutionally suspect punitive damages awards, however, has led to ambiguity. *See Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789. In *Trinity* and other punitive damages cases, this Court has acknowledged that *de novo* review is the proper standard to review a jury award of punitive damages when the defendant contends that a punitive damage award is so excessive that it violates the defendant's due process

rights. *Id*. at ¶ 49. The Court also has noted, however, that because punitive damages determinations are within the purview of the jury's discretion, the Court is "reluctant" to set aside a large jury verdict. *Id.* at ¶ 46 (citing *Jacque v. Steenberg Homes, Inc.,* 209 Wis. 2d 605, 626, 563 N.W.2d 154 (1997)). These two pronouncements appear to be fundamentally at odds – either the jury determination is subject to *de novo* review or it is not.

Indeed, the Court of Appeals' treatment of the standard of review in this case highlights this tension in Wisconsin law. The Court of Appeals acknowledged that the three-part test articulated by the U.S. Supreme Court in *Campbell*, 538 U.S. 408, and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), is the appropriate test to analyze the constitutionality of a punitive damages award. Citing *Trinity*, however, the Court of Appeals went on to state:

> 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." When a punitive damages award is appealed as unconstitutionally excessive, we review the award de novo.

Kimble v. Land Concepts, Inc., 2012 WI APP 132, ¶¶ 40-41, 345 Wis. 2d 60, 823 N.W.2d 839 (unpublished). The Court of Appeals, tracking *Trinity*'s ambiguity, appears to have reviewed the punitive damages award under the abuse of discretion standard instead of the more rigorous, and U.S. Supreme Court-mandated, *de novo* standard. *Id*.

This Court should resolve the issue and unequivocally state that *de novo* review of punitive damages awards is mandatory when the constitutionality of the award is placed in doubt. That is the only appropriate standard to ensure that a jury award comports with constitutional due process guarantees. U.S. Supreme Court precedent on this issue is clear. This Court should embrace the same approach.

B. This Court should expressly adopt and apply the U.S. Supreme Court's three-part test for analyzing whether a punitive damage award comports with constitutional due process guarantees.

While this Court previously has acknowledged the *Campbell* three-part test as precedent for analyzing a punitive damages award, subsequent Wisconsin cases have strayed from the *Campbell* Court's guidance. In *Campbell*, the Court noted that Fourteenth Amendment Due Process protections require "'that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty, that a State may impose.'" 538 U.S. at 417 (citing *Cooper Indus.*, 532 U.S. at 433 and *Gore*, 517 U.S. at 574). To effectuate the notice requirement, the Court endorsed the following three factors for a court to weigh:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded the jury and the civil penalties authorized or imposed in comparable cases.

Campbell, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575). While Wisconsin courts acknowledge this three-part test, they have strayed substantially from the U.S. Supreme Court's pronouncements in applying the test – in ways that jeopardize constitutional due process guarantees. Wisconsin law must be clarified to ensure that due process protections are maintained.

1. A punitive damages award amounting to a large multiplier of a compensatory damages award should be subject to increased scrutiny.

Although the *Campbell* Court declined to impose a bright-line ratio that a punitive damage award may not exceed, the Court noted that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. The Court invoked *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), where it noted that an award of more than four times the amount of compensatory damages might be close to the line

of constitutional impropriety. *Id.* at 23-24. Wisconsin courts' dismissal of this statement as mere "dicta" is highly alarming. *See Strenke v. Hogner*, 2005 WI App 194, ¶ 24, n.14, 287 Wis. 2d 135, 704 N.W.2d 309.

The Supreme Court also has suggested that one useful guidepost for determining whether a ratio of compensatory to punitive damages is grossly excessive is to compare the statutory penalty available for the same conduct to the punitive damage award. In the instant case, the available penalty would be, at most, $10,000 for a violation of "any insurance statute or rule of this state" under Wis. Stat. § 601.64(4). The ratio between the potential penalty and the punitive damage award in this case – 100 to 1 – clearly is unreasonable. (*c.f. Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2002 WI App 46, ¶ 40, 251 Wis. 2d 212, 641 N.W.2d 504 (ratio 7 to 1).)

2. Damages stemming from bodily injury or violence may warrant a punitive award constituting a higher multiplier of compensatory damages than damages from breach of contract or business torts.

In *Campbell*, the Supreme Court underscored its previous pronouncement that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 575). The Court clarified that this "reprehensibility analysis" requires consideration of whether the harm was physical as opposed to economic, whether the tortious conduct "evinced an indifference to or a reckless disregard of the health or safety of others," whether "the target of the conduct had financial vulnerability," whether the conduct was isolated or repeated, and whether "malice, trickery, or deceit" caused the harm. *Campbell*, 538 U.S. at 419. Additionally, the Court noted that

> [i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be

> awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id.

This Court should adopt the U.S. Supreme Court's position that conduct involving violence or trickery is more blameworthy than non-violent acts, including negligence and breach of contract. *Gore*, 517 U.S. at 575-56. In *Gore*, the Court struck down as "grossly excessive" a punitive damages award against BMW for its failure to inform a customer that it had repainted a car before selling it as a new car, noting that the "harm BMW inflicted on Dr. Gore was purely economic in nature" and "evinced no indifference to or reckless disregard for the health and safety of others." *Id.* at 576.

The conduct of BMW, like the conduct of First American in this case, involved no possible threat of bodily harm or severe economic impact, and it stands in stark contrast to a drunk driver injuring another motorist, for example, *Strenke v. Hogner*, 2005 WI 25, 279 Wis. 2d 52,

694 N.W.2d 296, or a social worker committing repeated acts of sexual assault on his minor client, *J.K. v. Peters*, 2011 WI APP 149, ¶ 52, 337 Wis. 2d 504, 808 N.W.2d 141 (Ct. App. 2011).

3. The wealth of the defendant does not justify an otherwise unconstitutional award of punitive damages.

Wisconsin courts should adopt the Supreme Court's position that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427 (citing *Gore,* 517 U.S. at 585). In this case, the wealth of the defendant was one of the only factors supporting the award of punitive damages. This Court should clarify that this fact alone cannot form the basis of an excessive punitive damages award.

II. SOUND PUBLIC POLICY MILITATES AGAINST PUNITIVE DAMAGES AWARDS AMOUNTING TO MANY MULTIPLES OF COMPENSATORY DAMAGES.

Excessive punitive damage awards have the potential to create extreme financial hardship, and they are almost

impossible to plan for. Therefore, sound public policy weighs against their frequent imposition.

Many liability insurance policies contain express exclusions for punitive damage awards. Nearly all contain express exclusions for intentional acts and occurrences – the types of conduct that most frequently form the basis for punitive damages awards. Hence, insurance coverage often is unavailable to defendants subjected to punitive damages awards. Most individuals, and indeed many corporations, would have a very difficult time paying large punitive damages awards, resulting in unpredictable financial hardship to those defendants who are subjected to them.

Excessive punitive damages awards also are inherently unpredictable, making it nearly impossible for an insurance company to underwrite for the risk they pose. Furthermore, where there is no insurance, individuals and companies cannot easily budget for punitive damages. This type of uncertainty in mitigating risk is exactly why the Supreme

Court has mandated that a defendant must be on notice of the size of the monetary penalty to which he may become subject if he undertakes a certain course of conduct.

Because punitive damage awards many times greater than the underlying harm are, by their very nature, extremely difficult to predict with precision, it is extremely difficult to provide defendants with constitutionally required notice of the types of conduct for which they may become subject to such an award and how large that award may be. *Cooper Indus.*, 532 U.S. at 433; *Gore*, 517 U.S. at 562.

The Wisconsin Legislature agrees. With 2011 Act 2, the Legislature created Wis. Stat. § 895.043(6), reigning in awards of excessive punitive damages.

> (6) Limitation on Damages. Punitive Damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater.

Wis. Stat. § 895.043(6). This new statutory limitation on punitive damages applies to actions commenced on or after February 1, 2011. Unfortunately, it does not apply to actions

already in the pipeline as of the effective date, including this case. For those lawsuits not covered by 2011 Act 2, this Court should scrutinize excessive punitive damage awards based on state and federal due process protections.

III. AN INSURANCE COMPANY'S DENIAL OF COVERAGE, MADE AFTER A REASONED THOUGH INCORRECT ANALYSIS, THAT RESULTS IN NO PHYSICAL INJURY, IS NOT PROPERLY THE BASIS FOR EXCESSIVE PUNITIVE DAMAGES UNDER U.S. SUPREME COURT JURISPRUDENCE.

A. Punishment via punitive damages awards many times greater than compensatory damages is not constitutionally sound for an incorrect coverage denial, not part of a larger pattern of misconduct, that does not result in bodily injury.

The purpose of punitive damages is to punish "the defendant and 'to deter others from like conduct.'" *Kink v. Combs*, 28 Wis. 2d 65, 81, 135 N.W.2d 789 (1965) (quoted source omitted). Punishment is not appropriate in most cases of misconduct, nor even in all cases involving bad faith. In fact, this Court expressly has cautioned that a bad faith cause of action does not necessarily warrant punitive damages.

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980) (superseded by statute on other grounds). As previously discussed, punishment is typically appropriate only in circumstances where bodily injury or extreme reckless disregard for the rights of another is evinced. *See Strenke*, 2005 WI App 194*; Gore*, 517 U.S. 559. *Trinity*, in particular, is distinguishable from this case because it involved an insurance company that was told by the Wisconsin Supreme Court 30 years prior what to do in the event of a situation of mutual mistake, and it did not follow the Court's instruction. *Trinity,* 251 Wis. 2d 212, ¶ 26. In a case such as this one, where bodily injury, reckless disregard, or other egregious circumstances do not underlie the defendant's conduct, excessive punitive damages simply are not appropriate nor constitutionally sound.

B. An insurer already has a strong incentive to properly analyze coverage and, thus, there is no need for additional deterrence.

The objective of deterrence is not served by permitting punitive damages awards far in excess of the contract damages against insurance companies who incorrectly deny coverage. Insurance companies already have a strong incentive to properly analyze coverage under their policies because, if they refuse coverage and are later found to have breached their duty to provide coverage, the insurance company may have to pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract – irrespective of policy limits. *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 838, 501 N.W.2d 1 (1993).

In light of the harsh consequences in Wisconsin for an insurer who breaches its coverage obligations, no additional deterrence is necessary to encourage an insurer to comply with its legal duties.

CONCLUSION

For the reasons stated above and based on the entire record in this action, the Wisconsin Insurance Alliance, the Wisconsin Civil Justice Council, Inc., and Wisconsin Manufacturers & Commerce respectfully request that this Court reverse the decision of the Court of Appeals.

Dated this 26th day of November, 2013.

Respectfully submitted,

GODFREY & KAHN, S.C.

By:

s/ James A. Friedman

James A. Friedman
State Bar No. 1020756
Kerry L. Gabrielson
State Bar No. 1084845

One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(Phone) (608) 257-3911
(Fax) (608) 257-0609

Attorneys for the Wisconsin Insurance Alliance, the Wisconsin Civil Justice Council, Inc., and Wisconsin Manufacturers & Commerce

CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,756 words.

Dated: November 26, 2013.

s/ James A. Friedman
James A. Friedman

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: November 26, 2013.

s/ James A. Friedman
James A. Friedman

10486559.1