

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1796

Cir. Ct. No. 2006CV2449

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LEGACY DC, INC.,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. ACTKINS AND DANNIE R. ACTKINS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Racine County:
WAYNE J. MARIK, Judge. *Affirmed.*

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

¶1 PER CURIAM. William J. Actkins and Dannie R. Actkins have appealed from a judgment entered after a jury trial, awarding the respondent, Legacy DC, Inc., damages, costs, and fees of \$547,865.45. In its special verdict, the jury found that the Actkins breached their contract with Legacy and awarded

\$540,000 in compensatory damages for the breach. The jury also awarded Legacy \$3000 based upon its finding that the Actkins wrongly interfered with Legacy's title to three condominium units. The jury further found that Legacy did not intentionally control or take property belonging to the Actkins. Because the jury's verdict is supported by the evidence at trial, we affirm the judgment.

¶2 This action arose from a condominium development agreement between the Actkins and Legacy.¹ Evidence at trial indicated that the Actkins had purchased 8.77 acres of land in Caledonia, Wisconsin, for \$97,000 in 1996. In 2002 they approached Legacy to create a plan for developing the property. Legacy prepared a development plan that called for 22 condominium units, or building pads, upon which buyers would construct single-family dwellings.

¶3 On June 7, 2002, Legacy and the Actkins executed a Development Agreement whereby Legacy was to develop the Actkins' real estate into a residential multi-unit condominium development (Woodland Pines). The Development Agreement contained detailed provisions regarding plat preparation and the obtaining of necessary condominium approvals. It stated that once condominium approval was obtained, Legacy, at its own expense, was required to make arrangements for the installation of the infrastructure for the condominium development, including sewers, water mains, storm sewers, and roadways. Section 4(b) provided:

¹ The original development agreement was between the Actkins and Legacy Development Co., LLP. Legacy DC, Inc., is the successor to Legacy Development Co., LLP.

Developer shall negotiate and obtain a loan from a commercial lender for the cost of installing the infrastructure for the Condominium. The loan shall be structured so that funds may be drawn upon as needed for such infrastructure. The Actkins agree to secure the loan with a mortgage on the Real Estate. The loan shall provide for partial release on the mortgage as Condominium Units are sold. All loan documents (other than the mortgage) will be signed by the Developer.

¶4 The Development Agreement further provided that Legacy would engage a real estate broker acceptable to Legacy to market the units.² The Actkins represented that they owned the real estate free and clear of any liens and encumbrances except for one mortgage with an outstanding balance of \$82,629.68 as of the date of the agreement. The Actkins agreed that they would sign all applications, forms, documents and deeds as required to fulfill the purposes expressed in the Development Agreement.

¶5 Section 8 of the Development Agreement dealt with the proceeds of sale. It provided:

The amounts payable to the Developer pursuant to this section 8 shall constitute the Developer's development fee for the Developer's development services hereunder. The parties acknowledge that the sole legal relationship that exists between the parties is that of the owner of the real estate and a contractor. The parties agree that the parties do not intend to create a partnership or joint venture with respect to the Development of the Real Estate.

² In their appellants' brief, the Actkins contend that the Development Agreement stated that a real estate broker satisfactory to the Actkins had to be hired. This is incorrect. Section 6(a) of the Development Agreement stated: "Developer shall engage a real estate broker acceptable to Developer to market units within the Condominium."

- (a) Proceeds Prior to the Payoff of the Mortgage. While any amount remains outstanding on the mortgage note executed by Developer pursuant to subsection 4(b) above, the net proceeds of the sale of any unit within the Condominium (prior to the payoff of any amount necessary to obtain the release of such unit from any mortgage encumbering the Real Estate) shall be distributed as follows: (i) the payoff amount required by the Developer's lender to obtain the release of the unit from any mortgage granted pursuant to subsection 4(b) shall be paid to such lender; (ii) an amount which bears the same ratio to One Hundred Twenty Five Thousand and 00/100 (\$125,000.00) Dollars as the amount required under sub. (a) bears to Three Hundred Thousand and 00/100 (\$300,000.00) Dollars shall be paid to the Actkins (this amount shall be used to payoff any mortgage existing on the property other than a mortgage described in subsection 4(b)); (iii) any remaining proceeds shall be distributed one-half (1/2) to Developer and one-half (1/2) to the Actkins.
- (b) Proceeds After the Payoff of the Mortgage. After any mortgage note(s) executed by Developer pursuant to subsection 4(b) above have been paid in full, the net proceeds of the sale of any unit within the Condominium (prior to the payoff of any amount necessary to obtain the release of such unit from any mortgage encumbering the Real Estate) shall be distributed as follows: one-half (1/2) to the Developer and one-half (1/2) to the Actkins.

¶6 At trial, John Holding, the president and manager of Legacy, testified that to finance the construction of the infrastructure for the Woodland Pines development, Legacy obtained a \$520,000 loan from M&I Bank. He testified that Legacy also obtained a \$2 million dollar line of credit from M&I Bank to cover payments to building contractors to build homes on the building pad units after the units were sold.³ Holding testified that the Actkins granted M&I Bank a mortgage on their land to secure the \$2,520,000 sum loaned or to be

³ The testimony of Jim Neuroth, a vice-president for M&I Bank, confirmed that a \$520,000 loan and \$2 million dollar line of credit were provided to Legacy.

loaned to Legacy, a fact confirmed by the terms of the mortgage note executed by the Actkins on February 17, 2003.

¶7 In testifying concerning section 8(a) of the Development Agreement, Holding testified that the parties had valued the Actkins' land at \$125,000. He testified that under the Development Agreement, the Actkins therefore would be paid the value of their original \$82,629 mortgage, the \$42,371 difference between \$82,629 and \$125,000, plus one-half of the profits from the sale of the building pad units after the \$520,000 development loan from M&I Bank was paid.

¶8 During the condominium approval process, the number of condominium units, or building pads, in Woodland Pines was reduced from twenty-two to twenty. Upon completion of the process, Legacy commenced marketing the units for sale for \$59,900.

¶9 Holding testified that the Actkins subsequently became concerned with the amount of time being taken to develop Woodland Pines. He testified that based upon those concerns and because the Actkins wanted to live at Woodland Pines, he proposed an alternative option whereby, in lieu of receiving their share of the profits in the manner specified in the Development Agreement, Legacy would be responsible for building a home on unit 10 for the Actkins with a fair market value of up to \$225,000, and would assume the \$80,000 still owed on their original mortgage for the purchase of the real estate. Holding testified that he made clear to the Actkins that if they chose the house, they were giving up their right to any other share of the profits of the development, and the Actkins indicated that they understood.

¶10 Holding's testimony indicated that based upon the Actkins' agreement to this modification, Legacy contracted with Coventry Builders to build

a house for the Actkins on unit 10. Holding testified that the contract price was \$191,000 and that Legacy borrowed this money from M&I Bank as a separate loan from the original \$520,000 loan and line of credit. Holding testified that the home was built at no cost to the Actkins, except for some upgrades they made. He testified that the Actkins moved into the house in late 2004 or early 2005 and had lived there since then. Holding also testified that Legacy was fulfilling its obligation under the modified agreement and had made all payments on the loan for the Actkins' home.

¶11 Holding further testified that after the Actkins received the house, they agreed to give him power of attorney to enable him to sell the remaining units. On October 25, 2005, the Actkins signed a written power of attorney appointing Holding as their "attorney-in-fact." The power of attorney form stated:

John A. Holding may in the name place or stead of William J. Actkins and Dannie R. Actkins, act with respect to all matters concerning the execution of the Offer to Purchase, closing statements, transfer tax returns, Warranty Deeds, and any other documents which may be necessary for the sale of Lots in Woodland Pines Condominium, Town of Caledonia, ...

This Power of Attorney shall become effective upon its execution and shall continue in force until revoked by William J. Actkins and Dannie R. Actkins in writing; provided, however, that any such written revocation shall be effective only upon recording in the office of the Register of Deeds for Racine County, Wisconsin.

¶12 Using the power of attorney, Holding executed quit claim deeds in 2006 and transferred title to units 5, 13, 15, and 16 from the Actkins to Legacy. Holding testified that Legacy purchased the units for the purpose of building model homes on them. Evidence indicated that Legacy paid \$59,900 for each unit, of which \$47,000 went to release M&I's mortgage on that unit, with the remainder

used to offset Legacy's development costs. Legacy then obtained financing from First Banking Center to build homes on units 5, 15, and 16, secured by mortgages on those units.

¶13 On November 22, 2006, the Actkins, by counsel, sent a letter to Legacy stating that they had revoked the power of attorney given to Holding and were retaining the services of another broker to sell the remaining unsold lots. They stated that the proceeds from the sales would first be used to pay off the remaining mortgage on their property, and then to "complete the condominium project." At trial, William Actkins testified that he and his wife intended to keep the money from the sale of the remaining eight lots.

¶14 After receiving the Actkins' letter, Legacy commenced this lawsuit. In its amended complaint, Legacy alleged that the Actkins had breached the Development Agreement by unilaterally terminating it. It alleged that the Actkins were proposing to sell the eight units that remained unsold, and that it was entitled to compensation from the sale of those units. In a claim for unjust enrichment, Legacy also alleged that as substantial compensation for their share of the net proceeds from the sale of the Woodland Pines units, the Actkins had agreed to have Legacy pay for the construction of their home, which they had moved into on or about December 2004.

¶15 In its amended complaint, Legacy also alleged that it owned units 5, 15, and 16 of the Woodland Pines development, and that the Actkins had slandered its title to those units in violation of WIS. STAT. § 706.13 (2007-08).⁴ In

⁴ All references to the Wisconsin statutes are to the 2007-08 version unless otherwise noted.

support of this claim, Legacy alleged that the Actkins had filed a lis pendens on each of the three units, even though they had not yet filed any counterclaim or legal action asserting an interest in units 5, 15, or 16. Subsequently, the Actkins filed an answer to the amended complaint, affirmative defenses, and counterclaims. Among other things they alleged that Legacy had converted units 5, 15, and 16.

¶16 As noted above, at trial the jury returned a special verdict in which it found that the Actkins breached their contract with Legacy, and that \$540,000 would compensate Legacy for the breach. The jury found that Legacy owned units 5, 15, and 16 of the Woodland Pines development, that the Actkins had wrongfully interfered with Legacy's title to those units, and that \$3000 would compensate Legacy for such interference. The jury also rejected the Actkins' counterclaim for conversion, finding that Legacy did not intentionally control or take property belonging to the Actkins.

¶17 The Actkins' first argument on appeal is that they "did not breach the Development Agreement by hiring a licensed real estate agent because it was not a material breach." Essentially, the Actkins are challenging the sufficiency of the evidence to support the jury's special verdict finding that they breached their contract with Legacy.

¶18 Appellate review of a jury's verdict is limited and narrow. *Hoffmann v. Wisconsin Elect. Power Co.*, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. We must view the evidence in the light most favorable to the jury's verdict and sustain the verdict if there is any credible evidence to support it, regardless of whether there is evidence to support a different verdict. *Id.* The credibility of the witnesses and the weight to be given their testimony is for the

jury. *Id.* Special deference is afforded to a jury verdict that has been upheld by the trial court. *Id.* The jury's verdict will be upheld even if it is contradicted by evidence that is stronger and more convincing. *Id.* We will not upset the verdict unless there is such a complete failure of proof that the verdict must have been based on speculation. *Id.*

¶19 As demonstrated by the evidence discussed above, credible evidence supports the jury's finding that the Actkins breached their contract with Legacy. Pursuant to the Development Agreement, Legacy was entitled to select a real estate broker to market the units. The Actkins breached the agreement when they retained a real estate agent and denied Legacy its right to market the eight remaining unsold units.⁵ The jury was entitled to conclude that the Actkins' breach was material. *See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996) (a breach of contract is material when it is so serious as to destroy the essential object of the contract).

¶20 In finding a breach, the jury was also entitled to believe the evidence indicating that after execution of the Development Agreement, the Actkins agreed to modify the payment provisions and to accept a house built on unit 10 in lieu of accepting a share of the profits as units were sold. Although the Actkins contend that the statute of frauds codified in WIS. STAT. § 706.02 precluded an oral modification of the Development Agreement, they waived their right to raise the

⁵ The Actkins contend that they were entitled to retain a different real estate broker because Holding appointed his ex-wife, who was not a licensed real estate broker, to sell units. However, the jury was entitled to conclude that Holding's conduct was not a breach by Legacy, which was entitled under the Development Agreement to engage a real estate broker of its own choosing. This is particularly true in light of evidence at trial indicating that during the time that Holding's ex-wife was involved in sales, Legacy was also using Dan Pettit as a broker. Pettit was an attorney and licensed broker from the law firm that represented Legacy.

statute of frauds as a defense when they failed to raise it in their pleadings as required by WIS. STAT. § 802.02(3). *See Weber v. Weber*, 176 Wis. 2d 1085, 1093, 501 N.W.2d 413 (1993).⁶ Consequently, because the jury was entitled to find that the Actkins agreed to take the house and lot in lieu of receiving profits from the sale of the remaining units, the jurors could reasonably conclude that the Actkins breached their contract with Legacy by interfering with Legacy's ability to sell the remaining units.⁷

⁶ The Actkins contend that *Weber v. Weber*, 176 Wis. 2d 1085, 501 N.W.2d 413 (1993), is inapposite because in that case, the court allowed the defendants to raise the statute of frauds even though they had not raised it as an affirmative defense. However, while acknowledging that the statute of frauds waiver rule was well established, the *Weber* court concluded that the pleading requirement set forth in WIS. STAT. § 802.02(3) could not be applied in derogation of a substantive right conferred by WIS. STAT. § 706.02(1)(f) for homestead property. *Weber*, 176 Wis. 2d at 1094-95, 1097. In contrast, application of the waiver rule to this case does not impair the Actkins' homestead rights. This case therefore does not fall within the exception to the general rule of waiver discussed in *Weber*.

In addition to waiving the statute of frauds defense by failing to raise it as an affirmative defense in their pleadings, the Actkins have also failed to demonstrate that they clearly and timely raised the issue in the trial court. Courts generally will not consider an issue raised for the first time on appeal. *Evjen v. Evjen*, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992). While the Actkins contend that they timely raised the statute of frauds in their motion for a directed verdict, a review of that motion reveals that it discusses the effect of the statute of frauds on a quit claim deed signed by Holding, not the Development Agreement. The only other citation provided by the Actkins to support their claim that they raised the issue is their citation to their postverdict motion for a directed verdict or a change in the jury's answers. Even in this motion, their discussion of the statute of frauds relates to Holding's transfer of property by quit claim deed. They did not clearly contend that the oral modification of the Development Agreement violated the statute of frauds. They therefore waived this issue for purposes of appeal.

⁷ In their reply brief, the Actkins also cite the portion of the Development Agreement which stated that any amendment to the agreement had to be made in writing and signed by both parties and that any attempted oral modification would not be valid. However, none of the five arguments set forth by the Actkins in their brief-in-chief assert that the parties' modification of the Development Agreement was invalid because it was oral, nor is this argument clearly made in the body of their brief-in-chief. This court will not address an issue raised for the first time in a reply brief. *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

¶21 In challenging the judgment against it, the Actkins also contend that Legacy violated the Development Agreement by giving mortgages to First Banking Center on units 5, 15, and 16. They contend that their agreement with M&I Bank prohibited additional mortgages on the real estate and that Legacy's actions therefore violated the Development Agreement.

¶22 The Actkins' argument provides no basis for relief on appeal. As provided in the Development Agreement, it was Legacy, not the Actkins, that borrowed funds from M&I Bank to develop the Woodland Pines project. The Actkins merely signed a mortgage as collateral for Legacy's loan. Evidence at trial indicated that the M&I Bank loan pertaining to units 5, 13, 15, and 16 was paid and the units were released from the mortgage given to M&I Bank before First Banking Center loaned money to Legacy to build homes on units 5, 15 and 16.

¶23 In any event, when Legacy borrowed money from First Banking Center to build homes on units 5, 15, and 16, the Actkins had surrendered any interest they had in those units in exchange for a home on unit 10. Legacy's conduct was therefore consistent with the Development Agreement as modified, whereby Legacy was to receive the proceeds from the sale of the unsold units. Nothing prevented Legacy from electing to finance the building of homes on those units to entice buyers to purchase them.

¶24 The Actkins' next argument is that Holding violated the power of attorney and converted their property when he transferred title to units 5, 13, 15, and 16 to Legacy. However, Holding is not a party to this action. In addition, even if his acts could be imputed to Legacy, the jury rejected the Actkins'

conversion claim, finding that Legacy did not intentionally control or take property belonging to the Actkins.

¶25 The jury's finding is supported by credible evidence indicating that the Actkins elected to accept a house on unit 10 in lieu of any profits from the sales of the unsold units, and signed a power of attorney that gave Holding authority to act in their stead with respect to all matters concerning the execution of offers to purchase, warranty deeds, and any other documents necessary for the sale of units in Woodland Pines. Evidence indicated that pursuant to this authority, Holding transferred title to units 5, 13, 15, and 16 to Legacy. Evidence also indicated that Legacy paid \$59,900 for each unit, paying M&I Bank the \$47,000 necessary to release the mortgage on each unit and offsetting the remainder of the purchase price from its development costs. Based upon this evidence, the jury's finding that Legacy did not convert the Actkins' property must be upheld.

¶26 This same evidence defeats the Actkins' fourth argument on appeal, wherein they contend that they "did not slander title to their own land." As already discussed, the jury found that Legacy owned units 5, 15, and 16, and that the Actkins wrongly interfered with Legacy's titles to those units when they filed lis pendens against those units. Because the evidence at trial permitted the jury to find that Legacy owned units 5, 15, and 16 when the lis pendens were filed, no

basis exists to disturb the portion of the judgment awarding Legacy \$3000 under WIS. STAT. § 706.13 for slander of title.⁸

¶27 The Actkins' final argument is that the evidence was insufficient to support the award of \$540,000 in damages for the breach of contract. We disagree.

¶28 The standard of review for a jury award of damages is similar to the standard of review for other jury verdicts. *D.L. Anderson's Lakeside Leisure Co., Inc., v. Anderson*, 2008 WI 126, ¶26, 314 Wis. 2d 560, 757 N.W.2d 803. This court will not disturb the jury's award if there is any credible evidence to support it, especially when the verdict has the approval of the trial court. *Id.* An injured party is entitled to the benefit of its agreement, which is the net gain it would have realized from the contract but for the other party's failure to perform. *Thorp Sales Corp. v. Gyuro Grading Co., Inc.*, 111 Wis. 2d 431, 438-39, 331 N.W.2d 342

⁸ On appeal, the Actkins contend that they are not liable for slander of title because they did not file a lis pendens that was knowingly false, sham, or frivolous. They appear to contend that Legacy was not entitled to judgment on its slander of title claims because it argued only that the Actkins filed the lis pendens before filing their counterclaim, rather than after filing their counterclaim as provided in WIS. STAT. § 840.10(1)(a).

In the jury instructions pertaining to slander of title, the trial court instructed the jury that slander of title occurs where one party unlawfully encumbers another party's title to real property. It instructed the jury that to prove this cause of action, the plaintiff must show that it owned real property and that the defendants unlawfully encumbered the plaintiff's title to the property. The trial court also informed the jury that it had taken judicial notice that a lis pendens was filed by the Actkins against units 5, 15, and 16 on January 4, 2007, and that the parties had stipulated that as of January 4, 2007, the Actkins had not filed any counterclaim or cross-complaint asking for relief and containing a legal description of those units.

At the jury instruction conference, the Actkins consented to the jury instruction that was given by the trial court. They did not contend that the instruction was deficient because it did not instruct the jury that a lis pendens must be knowingly false, sham, or frivolous before slander of title may be found. They therefore waived this issue, and we will address it no further. *See Allen v. PSC*, 2005 WI App 40, ¶20, 279 Wis. 2d 488, 694 N.W.2d 420.

(1983). Although damages must be proven with reasonable certainty, they need not be proven with mathematical precision. *Management Computer Servs.*, 206 Wis. 2d at 189. Evidence of damages is sufficient if it enables the jury to make a fair and reasonable approximation. *Id.*

¶29 Credible evidence supports the \$540,000 award. Steven Jenkins, a certified public accountant, testified extensively as to Legacy's damages. He testified that selling twenty units, or lots, for \$59,900 would have yielded \$1,198,000. He testified as to Legacy's reasonable development costs, and subtracted those costs to yield an estimated profit of \$264,000. He concluded that splitting the profit equally between the Actkins and Legacy as provided in the Development Agreement would have required paying the Actkins \$132,000. Because the Atkins were also entitled to have their original mortgage of \$83,343 paid, as well as payment of the \$41,657 difference between the mortgage amount and the \$125,000 value agreed upon for their land, Jenkins concluded that the Actkins were entitled to be paid \$257,000 under the Development Agreement. However, he further concluded that they had already received \$348,588, comprised of the house valued at \$200,664, the lot valued at \$59,900, the \$83,343 that Legacy was required to pay on their original mortgage, plus \$4681 that they had received as proceeds from the sale of unit 1. Jenkins testified that this had resulted in an overpayment to the Actkins of \$91,311. Because they had also retained eight unsold units in violation of their agreement with Legacy, each of which was valued at \$59,900, Jenkins arrived at a total compensatory damages figure of \$570,511.

¶30 Jenkins' testimony was credible and reasonable. Based upon it, no basis exists to disturb the jury's award of \$540,000 in compensatory damages. The trial court's judgment therefore is affirmed.⁹

By the Court.—Judgment affirmed.

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

⁹ In concluding, we note that the Actkins' briefs on appeal contain very few citations to the record as required by WIS. STAT. RULE 809.19(1)(d) and (e). If a party fails to provide citations to the record for asserted facts, this court is not required to search out those references or consider an argument based upon them. *Northwest Wholesale Lumber*, 191 Wis. 2d at 283-84. See also *Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

Judgment was entered in this case after a nine-day jury trial. Although the Actkins provided a lengthy appendix, facts must be supported by citations to the record, not just the appendix. *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶4 n.2, 281 Wis. 2d 173, 696 N.W.2d 194. Although we have reviewed the record, we caution counsel to include proper citations in the future.

