COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2596 **Cir. Ct. No. 2012CV512**

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

COLE BEHRNDT AND ASHLEY BEHRNDT,

PLAINTIFFS-APPELLANTS,

V.

AUSTIN MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. After their home was damaged by a fire, Cole and Ashley Behrndt sued Austin Mutual Insurance Company, alleging they were entitled to the face value of their homeowners insurance policy because their

property was a total loss under the valued policy law, WIS. STAT. § 632.05(2).[1] The circuit court granted summary judgment in favor of Austin Mutual. On appeal, the Behrndts argue Austin Mutual is not entitled to summary judgment because their house was a total loss and because Austin Mutual should be equitably estopped from arguing their property was *not* a total loss. We conclude summary judgment was properly granted in favor of Austin Mutual.

BACKGROUND

¶2 In July 2008, the Behrndts purchased a home prior to a foreclosure for $132,000. Believing they purchased the house below market value, the Behrndts wanted to insure the house for $150,000 or $175,000, and they purchased a homeowners insurance policy from Austin Mutual. In late 2008, after determining the replacement cost of the Behrndts' home was greater than their current policy, Austin Mutual increased the value of the Behrndts' policy. The Behrndts accepted this increase and paid the increased premiums accordingly.

¶3 A fire damaged the Behrndts' home on November 25, 2011. At the time of the fire, the homeowners insurance policy issued by Austin Mutual had a face value of $263,500.

¶4 On November 30, 2011, Town of Crystal Lake building inspector Craig Moriak wrote to the Behrndts, telling them he ordered their property to be razed because, after inspecting the property, "the building is so damaged that it would cost over 50% of the assessed value to repair the property." On December 7, 2011, the Behrndts submitted a Proof of Loss to Austin Mutual for

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the face value of the policy, alleging their property was a total loss. They also submitted an estimate from Insight Construction that it would cost $168,120 to repair their house.

¶5 Meanwhile, Austin Mutual hired: adjustor Michael Heck, to adjust the Behrndts' loss; structural engineer Geoffrey Jillson, to inspect and evaluate the structural integrity of the Behrndts' home and any building code issues; and licensed contractor Rene Bockart, to evaluate the scope of and damage to the Behrndts' house.

¶6 Heck inspected the property on November 29, 2011. He averred that, from the outside of the home, there was no indication that a fire had occurred other than some smoking of the windows. The fire damage was not apparent until he entered the structure. Heck opined, "The foundation, roof and outer walls did not sustain any damage. There was some fire damage on the interior of the dwelling, but the majority of the repairs will be for remediation due to smoke damage."

¶7 Jillson averred, "[F]rom the front of the house there is no indication that a fire occurred. The siding and roofing are in place. There is some noticeable smoking and broken windows at the rear and right elevation, but overall the fire damage was not apparent until I entered the structure." Jillson averred the foundation and roof did not sustain any damage, there was limited damage to the main level rear wall, the roof and attic were structurally sound, and there was no burn through of drywall or the exterior wall. Jillson opined the house was structurally sound and could be repaired.

¶8 Bockart inspected the property and "from the outside of the structure, there was no indication that a fire had occurred at the home, other than"

some broken windows. Bockart opined the structure was repairable, noting that "while the inside of the structure sustained some fire and smoke damage, the foundation, roof, and outer walls did not sustain any damage." Bockart estimated that the actual cash value of repair was $120,275.11 and the replacement value was $147,579.55.

¶9 Based on the opinions of Heck, Jillson, and Bockart, Austin Mutual appealed the Town's raze order. A special board meeting was held on January 19, 2012. After viewing the structure and hearing the evidence presented by Austin Mutual and the Behrndts, the Town overturned the raze order. The Behrndts did not appeal this decision.

¶10 Austin Mutual then tendered a check to the Behrndts in the amount of $120,257.11. The Behrndts continued to dispute the amount of the loss. Austin Mutual invoked the appraisal provisions of the Behrndts' insurance policy. Each party appointed an appraiser and the two appraisers appointed a third appraiser as umpire. The appraisal panel determined the property could be repaired and determined the actual cash value of the repairs was $100,476.35 and the replacement cost value was $154,579.

¶11 The Behrndts then brought the present suit against Austin Mutual, alleging they were entitled to the face value of the policy, or $263,500, because their house was a "total loss." The Behrndts contended their house was a total loss because the cost of repair exceeded the house's pre-fire value.

¶12 Austin Mutual answered, denied the Behrndts' assertion that their house was a total loss, and moved for summary judgment. It argued the cost of repair compared to the property's pre-fire value is not the standard for determining a "total loss" in Wisconsin. Austin Mutual asserted a property is considered a

total loss only if it is "wholly destroyed." It argued the Behrndts' house was not "wholly destroyed" because the property's specific character as a house was still recognizable and the evidence showed the house was repairable.

¶13 The Behrndts also moved for summary judgment. They continued to argue their house was a total loss because the cost to repair the property exceeded the house's pre-fire value. Additionally, the Behrndts asserted Austin Mutual should be equitably estopped from arguing the house was not a total loss.

¶14 The circuit court granted summary judgment in favor of Austin Mutual. It determined the property was not a total loss because it was not "wholly destroyed." It also concluded Austin Mutual's argument was not barred by equitable estoppel. The Behrndts appeal.

DISCUSSION

¶15 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Novell v. Migliaccio***, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

I. Valued Policy Law

¶16 Originally enacted in 1874, the valued policy law requires insurers to pay the policy limits, not the actual amount of a loss, to an insured if the property has been "wholly destroyed." *See* ***Seider v. O'Connell***, 2000 WI 76, ¶31, 236 Wis. 2d 211, 612 N.W.2d 659. The law "was designed to discourage owners from over-insuring property while simultaneously thwarting insurers from collecting excessive premiums." ***Id.***, ¶54. The valued policy law provides:

> Total loss. Whenever any policy insures real property that is owned and occupied by the insured primarily as a dwelling and the property is wholly destroyed, without criminal fault on the part of the insured or the insured's assigns, the amount of the loss shall be taken conclusively to be the policy limits of the policy insuring the property.

WIS. STAT. § 632.05(2). In this case, the application of the valued policy law turns on whether the Behrndts' house was "wholly destroyed."

¶17 In ***Eck v. Netherlands Insurance Co***., 203 Wis. 515, 234 N.W. 718 (1931), our supreme court noted that "wholly destroyed" under the valued policy law

> does not mean that the material of which the building is composed shall be annihilated or reduced to a shapeless mass; that when the identity of the structure as a building is destroyed, so that its specific character as such no longer remains and there is nothing left but the cellar walls and a dilapidated foundation, the loss is total within the meaning of the statute.

Id. (quoting ***St. Clara Female Academy v. Northwestern Nat'l Ins. Co.***, 98 Wis. 257, 266, 73 N.W. 767 (1898)). The court also stated wholly destroyed "does not mean an absolute extinction of the building; that the test is whether the building has lost its identity and specific character, so that it can be no longer called a building." ***Id.*** (quoting ***Hamburg-Bremen Fire Ins. Co. v. Garlington***, 18 S.W. 337 (Texas 1886)).

> [T]here cannot be a total loss so long as the remnant of the structure standing is reasonably adapted for use as a basis upon which to restore the building to the condition in which it was before the fire; and that whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before the fire, would in proceeding to restore it to its original condition utilize such remnant as such basis.

Id. (quotation omitted).

¶18 On appeal, the Behrndts renew their argument that their house was "wholly destroyed" because "the cost of repair is more than the pre-fire value of the damaged property." The problem with the Behrndts' argument is that, when determining whether a property is "wholly destroyed" under the valued policy law, our jurisprudence has not considered the cost of repair compared to the value of the property. Indeed, the Behrndts recognize that our jurisprudence has "seem[ed] to define 'wholly destroyed' in terms of the post-fire physical appearance of the structure but without regard to the value of the property or the cost of repairing the property." However, the Behrndts urge us to conclude that a "property is wholly destroyed under the valued policy law if the cost of repair is more than the pre-fire value of the damaged property."

¶19 In support of their assertion, the Behrndts raise numerous arguments, all of which we reject. They first argue that, when determining whether a property is wholly destroyed, "***Thompson*** [***v. Citizens' Insurance Co.***, 45 Wis. 388 (1878)] and … [WIS. STAT. §] 66.0413 suggest that a monetary analysis be employed."

¶20 The Behrndts' assertion that ***Thompson*** suggests a monetary analysis be employed is conclusory and undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider undeveloped arguments). Further, in ***Thompson***, the circuit court found that "the loss was total, *by the destruction of the entire property* insured, by fire." ***Thompson***, 45 Wis. at 389 (emphasis added). Because the property was entirely destroyed, it is unclear how the cost of repair compared to the value of the property determined whether the property was wholly destroyed. We will not consider the Behrndts' reliance on ***Thompson*** further.

¶21 Additionally, WIS. STAT. § 66.0413 does not independently establish that the cost of repair compared to the property's value determines whether the property is "wholly destroyed" under WIS. STAT. § 623.05(2). Section 66.0413 becomes relevant if the Behrndts were trying to establish they suffered a *constructive* total loss under § 632.05(2). WISCONSIN STAT. § 66.0413(1)(b) provides that a municipality may order a building destroyed if it "is old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation and *unreasonable to repair*[.]" (Emphasis added.) There is a rebuttable presumption that the cost to repair is unreasonable if the cost "would exceed 50% of the assessed value of the building divided by the ratio of the assessed value to the recommended value …." WIS. STAT. § 66.0413(1)(c). In ***Gimbels Midwest, Inc. v. Northwestern National Insurance Co.***, 72 Wis. 2d 84, 91, 240 N.W.2d 140 (1976), our supreme court concluded that if a municipality precludes an owner from rebuilding and instead requires the owner to destroy a building, a constructive total loss results and the valued policy law applies to require the insurer to pay the full face value of the policy.

¶22 In this case, although the Town of Crystal Lake building inspector issued a raze order, the town board overturned that order following a hearing in which the board visited the Behrndts' property and Austin Mutual presented evidence showing the property was repairable. The Behrndts never appealed the town's decision. Because the town did not prevent the Behrndts from repairing

the property, the Behrndts cannot argue they suffered a constructive total loss, and WIS. STAT. § 66.0413 is therefore inapplicable.[2]

¶23 The Behrndts next argue that "***Eck*** suggests that a reasonable person test be employed" to determine whether the property is "wholly destroyed." They argue under ***Eck*** "nobody … would ever spend $154,000 to fix something worth $72,500."[3] We disagree with the Behrndts' characterization of the "reasonable person" test in ***Eck***. As explained above, the test asks whether the condition of the remnant of the building is such that an uninsured person, who desires a structure such as the one before the fire, would use the remnant when restoring the building. ***Eck***, 203 Wis. at 515. The test is a way to determine whether the condition of a structure has lost its character and identity. The uninsured reasonable person in ***Eck*** is not asked to engage in a cost analysis.

¶24 Next, the Behrndts argue that, in automobile insurance policies, insurers will generally deem a vehicle a "total loss" if the cost to repair is greater than the vehicle's actual value. In support, they cite insurance policies from Allstate Insurance Company and Progressive Insurance Company. The Behrndts' comparison to automobiles and automobile insurance is irrelevant. The valued policy law applies *only* to real property owned and occupied as a dwelling. *See* WIS. STAT. § 632.05(2).

[2] In the circuit court, the Behrndts appeared to concede they could not argue they suffered a constructive total loss. In response to Austin Mutual's argument, the Behrndts asserted, "This type of loss is called a constructive loss. That is not what we have here. Here we have the question of the reasonableness of spending two times the pre-loss value of something to repair and whether such a situation constitutes 'wholly destroyed' under the valued policy law."

[3] The Behrndts argue their house had a pre-fire value of $72,500 based on an appraisal by Paul Welsch. Austin Mutual disputes the Behrndts' asserted pre-fire value. This factual dispute is not germane to our decision.

¶25 The Behrndts next contend that, pursuant to ***Wickman v. State Farm Fire & Casualty Co.***, 616 F.Supp. 2d 909, 916-17 (E.D. Wis. 2009), their "home would have been determined wholly destroyed." They assert that the court in ***Wickman*** refused to apply the valued policy law because the Wickmans "had no proof that the damage exceeded the value of the home and therefore it could not declare the home wholly destroyed." The Behrndts reason that had the Wickmans presented sufficient evidence, "it appears the court would have been willing to apply the valued policy law[.]"

¶26 The Behrndts misread ***Wickman***. In that case, the Wickmans brought suit against State Farm Fire and Casualty Company, alleging, in part, State Farm failed to pay the Wickmans the face value of their policy for a total loss caused by a fire. ***Id.*** at 911, 916. Ultimately, the court found the Wickmans' house was not a total loss because it was not "wholly destroyed" for purposes of WIS. STAT. § 632.05(2).

> Photographs taken of the exterior of house after the fire demonstrate that the structure remained standing. Although a portion of the exterior of the house was charred, much of the exterior appears to have been unaffected by the fire. Viewing these photographs, one cannot reasonably maintain that "identity of the structure as a building is destroyed so that its specific character as such no longer remains," as the structure was still recognizable as a house. ***Fischer*** [***v. Harmony Town Ins. Co.***], 249 Wis. 438, 442, 24 N.W.2d 887 (Wis. 1946). Further, … the village's building inspector[] found that approximately 35% of the building had been structurally damaged. No matter how the parties characterize the extent of the loss to the house, the photographs taken of the house are inconsistent with the Wickmans' claim the house was wholly destroyed.

Id. at 917-18 (record citations omitted). The ***Wickman*** court also found that, because no raze order had been issued, the Wickmans did not establish they suffered a constructive total loss. ***Id.*** at 918.

¶27 ***Wickman*** does not stand for the proposition that a structure is wholly destroyed if the cost of repair exceeds the property's pre-fire value. Rather, pursuant to ***Wickman***, and our jurisprudence, a property is "wholly destroyed" under WIS. STAT. § 632.05(2) if the "'identity of the structure as a building is destroyed so that its specific character as such no longer remains[.]'" ***Id.*** at 917-18 (quoting ***Fischer***, 249 Wis. at 442). The cost of repair compared to the property's pre-fire value is irrelevant when determining whether a property is "wholly destroyed." Accordingly, we reject the Behrndts' argument that their house was "wholly destroyed" for purposes of § 632.05(2) because the cost of repair exceeded their house's pre-fire value.

¶28 The Behrndts next argue, albeit in their reply brief, that even if we conclude "wholly destroyed" relates to the condition of the building, their home has been "wholly destroyed" because "nothing but the exterior shell remains." We need not consider arguments raised for the first time in a reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). In any event, the Behrndts' assertion that "nothing but the exterior shell remains" is unsupported by a record citation. This conclusory assertion cannot defeat the undisputed evidence presented by Austin Mutual—that the structure, identity, and character of the house remained intact despite the fire. We conclude summary judgment was appropriately granted in favor of Austin Mutual because the property was not "wholly destroyed."

II. Equitable Estoppel

¶29 The Behrndts also argue Austin Mutual should be equitably estopped from arguing "the home is not wholly destroyed." To prove equitable estoppel, a party must show: (1) action or nonaction; (2) on the part of one against whom

estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or nonaction; and (4) which is to his or her detriment. ***Nugent v. Slaght***, 2001 WI App 282, ¶29, 249 Wis. 2d 220, 638 N.W.2d 594. "Proof of estoppel must be clear, satisfactory and convincing and is not to rest on mere inference and conjecture." ***Gonzalez v. Teskey***, 160 Wis. 2d 1, 13, 465 N.W.2d 525 (Ct. App. 1990).

¶30 The Behrndts argue Austin Mutual should be estopped from arguing the house is not wholly destroyed because: Austin Mutual acted to increase the amount of insurance coverage based on its replacement cost analysis; the Behrndts relied on Austin Mutual's assessment and paid the corresponding increased premium amount; and their reliance was to the Behrndts' detriment because Austin Mutual is now arguing "it should not pay the face value of the policy despite that the home is wholly destroyed and costs double its value to repair." They assert Austin Mutual should be equitably estopped from arguing "that because the house can be fixed for less than the amount of coverage, the house cannot be deemed wholly destroyed[.]"

¶31 We reject the Behrndts' equitable estoppel argument. The argument improperly assumes Austin Mutual is refusing to pay the face value of the policy despite the fact that the property is "wholly destroyed" within the meaning of the valued policy law. Austin Mutual is not making that argument. Rather, it is arguing the valued policy law is inapplicable because the structure and the identity of the house remains and therefore the house is not "wholly destroyed."

¶32 More importantly, the Behrndts have not proven they paid the premiums to their detriment. They contracted for, and received the benefit of, an insurance policy in an amount sufficient to compensate them had there been a total

loss to their property. They were then compensated for the cost of repairing their home. As Austin Mutual points out, "the fact that the cost to repair the home, the structure of which is still intact, was $154,579 shows that had the policy limit not been increased, the amount would not be adequate if the home was actually totally destroyed or more extensively damaged." The Behrndts do not respond to this argument. *See* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded). In short, we conclude the Behrndts have not established by clear, satisfactory, and convincing evidence that Austin Mutual should be equitably estopped from arguing the property is not a total loss.

By the Court.—Judgment affirmed.

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