COURT OF APPEALS
DECISION
DATED AND FILED

April 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP821 **Cir. Ct. No. 2008CV562**

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

FONTANA BUILDERS, INC.,

PLAINTIFF-APPELLANT,

ANCHORBANK, FSB,

INTERVENING PLAINTIFF-CO-APPELLANT,

V.

ASSURANCE COMPANY OF AMERICA,

DEFENDANT-RESPONDENT.

APPEAL from judgments of the circuit court for Walworth County: PHILIP A. KOSS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. This marks this cases's second appearance before us. It presents a question of which of two insurance policies—builder's risk or homeowner's—covered the losses to a new home substantially damaged by fire before construction was complete. We affirm the judgments entered in favor of Assurance Company of America.

¶2 Assurance issued a builder's risk insurance policy on the home to Fontana Builders, Inc. Before it was completed, Fontana owner James Accola and his family moved into the house, still titled to Fontana. AnchorBank, FSB, Fontana's mortgagee, required the Accolas to purchase homeowner's insurance before it would close on a loan with them. The Accolas purchased a policy from Chubb Insurance Co. A week after the policy went into effect, a fire destroyed much of the home and its contents.

¶3 Fontana filed a claim under the Assurance builder's risk policy; the Accolas made a claim under their Chubb homeowner's policy. Pointing to Section E.3 of the builder's risk policy,[1] which provides that coverage would terminate "when permanent property insurance applies," Assurance denied coverage on grounds that the Chubb policy constituted "permanent property insurance" that "applied."[2] Without admitting liability, Chubb paid the Accolas $1.5 million pursuant to a settlement agreement.

[1] Section E.3 of the "additional conditions" portion of the Assurance policy enumerates events that, upon their occurrence, will cause coverage to terminate.

[2] Assurance also denied coverage based on the separate "Other Insurance" provisions of the policy. Given our ruling in this appeal, that question is moot.

¶4 Fontana sued Assurance for breach of contract and bad faith. The trial court ruled that the Assurance policy provided coverage as a matter of law. The jury found that Assurance's denial constituted a bad faith breach of contract. Assurance appealed.

¶5 After oral arguments in this court, we reversed the circuit court's decision that the Assurance builder's risk policy provided coverage as a matter of law. ***Fontana Builders, Inc. v. Assurance Co. of Am.***, No. 2010AP2074, unpublished slip op. ¶11 (Dec. 7, 2011). We said that on remand the jury would have to determine whether permanent property insurance applied at the time of the fire, and that the court could not "preclude the jury from considering the Chubb policy or any other extrinsic evidence that is relevant to Section E.3 of the [Assurance] policy." ***Id.***

¶6 AnchorBank intervened. At the second trial, over Fontana's objection, the court permitted evidence of the fact, purpose, and amounts of settlement payments Chubb made to the Accolas. The jury concluded that the Chubb policy was "permanent property insurance" that "applie[d]" at the time of the fire, thus terminating coverage under the Assurance builder's risk policy. The trial court denied Fontana's and AnchorBank's postverdict motions and entered judgment on the verdict. Fontana and AnchorBank now appeal.

¶7 Our standard of review is a narrow one. "We will not upset a jury verdict if there is any credible evidence to support it." ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 543, 472 N.W.2d 790 (Ct. App. 1991). "This is even more true when the trial court gives its explicit approval to the verdict by considering and denying postverdict motions." ***Id.*** Where more than one reasonable inference can be drawn from the credible evidence, we accept the one drawn by the trier of

fact. *See* ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶27, 312 Wis. 2d 435, 752 N.W.2d 359.

¶8 On remand, the trial court did precisely as we directed. It permitted the jury to consider the Chubb policy, payments made pursuant to it, and extrinsic evidence relevant to Section E.3 of the Assurance policy. The jury heard testimony that AnchorBank requires a prospective home buyer to purchase homeowner's insurance before the closing and expects the policy to continue as long as the mortgage exists; that the Accolas paid a full year's premium for the Chubb policy, which became effective on June 21, 2007 and ran until June 21, 2008; that Chubb recommended annual review of the policy; that Fontana held title to the house; that James Accola was Fontana's president and sole owner; that a fire destroyed the house and its contents on June 28, 2007; that three weeks after the fire Chubb's executive general adjuster began adjusting the loss, as Chubb had determined that the policy was in force at the time of the fire; and that Chubb did not deny coverage but instead made $1.5 million in payments to the Accolas and mortgagee AnchorBank, although Fontana was the mortgagor.

¶9 The court instructed the jury that "permanent" means "continuing or enduring without marked change in status or condition or place," that for an insurance policy to "apply," it must "be pertinent, suitable or relevant," but "does not 'apply' merely because it is bound, obtained or issued," and that, while a party must have an insurable interest, it may be in a property to which it does not hold title.[3] Evaluating the evidence in light of these instructions, the jury reasonably

[3] A person does not need a legal or equitable interest or any property interest in the subject matter insured in order to have an insurable interest. ***Stebane Nash Co. v. Campbellsport Mut. Ins. Co.***, 27 Wis. 2d 112, 119, 133 N.W.2d 737 (1965).

could have found that the Chubb policy was "permanent" and "applied," thus terminating Fontana's coverage under the Assurance builder's risk policy, as Section E.3 plainly states.

¶10 Fontana and AnchorBank strenuously insist that evidence regarding payments Chubb made pursuant to its policy were inadmissible settlement evidence. *See* WIS. STAT. § 904.08 (2013-14).[4] Whether to admit evidence is within the sound discretion of the trial court, and the trial court's decision will not be set aside unless there is an erroneous exercise of discretion. ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis. 2d 1, 12, 298 N.W.2d 102 (Ct. App. 1980).

¶11 Here, following this court's directive, evidence regarding the Chubb policy, the prompt adjustment activity, the substantial payments made, and the nature of those payments was not admitted in the context of settlement discussions. Rather, it was admitted to assist the jury in determining whether the Chubb policy was permanent and applied to the loss, such that it would cause the Assurance policy to terminate. The trial court recognized that WIS. STAT.

[4] WISCONSIN STAT. § 904.08 provides:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, novation or release, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

§ 904.08 precludes the admission of settlement evidence to show liability or prove the invalidity of a claim at issue and therefore instructed the jury that it was not to use the evidence for that purpose. We presume the jury followed those instructions. ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. We see no erroneous exercise of discretion.

¶12 Because we conclude that the evidence regarding the Chubb policy and payments was properly admitted and that the evidence was sufficient to support the jury verdicts, we reject Fontana's and AnchorBank's requests to either reverse the judgments or order a new trial.

By the Court.—Judgments affirmed.

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