COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1699-FT **Cir. Ct. No. 2016SC573**

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

ACUITY,

PLAINTIFF-APPELLANT,

V.

PROPERTY IMAGE LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

¶1 HAGEDORN, J.[1] This is a small claims action over insurance premiums. The insurer, Acuity, initiated this lawsuit against Property Image, LLC to recover premiums owed under a worker's compensation insurance policy and a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"Bis-Pak" policy—basically, a type of general liability policy. The parties disputed whether one of Property Image's employees was properly classified as a carpenter, which carried additional premiums. The circuit court ultimately dismissed Acuity's lawsuit on the grounds that Acuity was required to—but did not—give notice of the classification change prior to billing Property Image for the increased amount.

¶2 On appeal, Acuity argues that the terms of its policies with Property Image did not require it to give notice that the employee was being reclassified. Because Acuity did not raise this argument in the circuit court, we decline to address it for the first time on appeal and deem it forfeited. Acuity advances a fallback position that it was entitled to at least some of the damages it requested because Property Image had paid no premiums on the employee in question. The circuit court found Acuity's evidence on this latter point to be lacking and, for this reason, declined to order Property Image to pay additional premiums. Because the circuit court's findings on this point were not clearly erroneous, we affirm the order of the circuit court.

BACKGROUND

¶3 This litigation began when Acuity filed a complaint requesting a money judgment against Property Image to the tune of $8032.33. This sum consisted of $7742 "for insurance premiums due plaintiff by defendant" and "pre-judgment interest." The action was tried to the court commissioner, who dismissed Acuity's claim. Acuity requested a trial de novo before the circuit court, which held a bench trial on June 6, 2017. Two witnesses testified—Scott Offerdahl, an auditor with Acuity, and Angela Hassel, a co-owner of Property Image. Although the insurance policies were introduced into evidence, Acuity did

not refer to or argue the import of any specific terms in the policies, choosing instead to rely on Offerdahl's testimony to establish Property Image's obligations.[2]

¶4 Offerdahl explained that Property Image had both a "Bis-Pak" policy and a worker's compensation policy with Acuity. Under these policies, each Property Image employee was given a code based upon the work he or she performed, and each code carried a different attached premium. Offerdahl testified that when an insured like Property Image first obtains coverage, the insured "tells their agent and the agent tells Acuity how much payroll they think they will have and the type of work that they do." After the initial policy period, Acuity conducts an audit to "find out exactly how much payroll is and what type of work they did." Based on this audit, the premiums for the policy period under audit may go up or down, depending on the audit. Offerdahl explained that Acuity conducts an audit of the insured "roughly six to eight weeks after the policy period is up." Thus, any adjustment will ordinarily be "back in time" for the past policy period.

¶5 Offerdahl testified that he had conducted two audits related to Property Image's policies. The first audit was conducted in "August or September" of 2014—after the initial June 2013 to June 2014 policy period. During this audit, Offerdahl spoke with Kay Blair (Property Image's office manager) and concluded that one of Property Image's employees, Mark Voit, should have been classified as a carpenter. The carpentry classification would result in a higher premium for that employee. Although Acuity conducts an audit

[2] The insurance policies were introduced as exhibit nine, and—other than confirming that exhibit nine was indeed a copy of the policies—Acuity and Offerdahl did not refer to any of the specific terms in the 165 pages of the exhibit for the remainder of the trial.

after the initial policy period, Offerdahl explained that "we're not allowed to add a higher rated code [for the initial policy period] but we can add it for future use." Accordingly, Offerdahl explained that Acuity "added [the carpentry code] to the next year's policy."

¶6 Offerdahl conducted a second audit of the policies around September of 2015, covering the policy period from June 2014 to June 2015—the period at issue here.[3] Offerdahl explained that he again concluded that Voit should be classified under the carpentry code carrying the higher premium. However, unlike the first audit, this time Acuity charged Property Image the additional premium for the policy period ending in June 2015. The premium for Voit based on the carpentry classification was calculated at $7231 for the worker's compensation policy and $511 for the Bis-Pak policy for a total of $7742 premium owed by Property Image for coverage of Voit. Acuity also introduced Offerdahl's audit reports reflecting these additional amounts owed. Offerdahl confirmed that Acuity's lawsuit was to recover this $7742 from the second policy period.

¶7 On cross-examination, Offerdahl was asked why he did not "immediately" inform Property Image that Voit was going to be reclassified and therefore subject to a higher premium after Offerdahl's first audit. Offerdahl answered that he had "turned in the findings" from the first audit, but had not personally informed Property Image of the change. At this point, the court interjected with the following line of questioning:

> THE COURT: So does Property Image somehow get notified that you are telling their agent their premiums will

[3] Property Image was no longer insured by Acuity after the second policy period.

> need to go up next year because they are doing more than you thought?
>
> [OFFERDAHL]: They—yes, they get these reports and the agent—in this case, I don't know who the agent is or if the agent is in communication with the insured or not. But that's the *protocol* when there is a code added the agent is the representative.
>
> THE COURT: *That's the gist of the whole trial here.* If you told them, hey, you have a carpenter, your premiums are going to go up or maybe not this year but next. I can't figure out why they wouldn't. That's important. If you don't tell them, a reasonable person would think they are not going up.
>
> [OFFERDAHL]: Okay. And in this case I think that they're contending they don't do the work. I think that's what they are saying because of all of a sudden they have a different division and started getting into something else.
>
> THE COURT: But I'm not sure if they are doing the work or not. I'm saying I don't get it. If you do an audit and you find that they are doing carpentry or paying a carpenter, *don't they have to be told, hey, you have a carpenter so now your rates are going up?*
>
> [OFFERDAHL]: *They should be told.* I assume that the agent is the one telling them, I didn't do that. [Emphasis added.]

Offerdahl clarified that he did not know whether Acuity had actually informed Property Image of the classification change after his initial audit.

¶8 After a brief redirect by Acuity, the court again queried Offerdahl about the notice issue and asked whether the bill after the initial audit for the first policy period classified Voit as a carpenter. Acuity's counsel responded that it did not. The court also clarified that Offerdahl had "no idea if [Property Image] was ever told now that you have a carpenter your premiums will go up," and he did not tell Property Image personally. The court then asked the parties if they had

"[a]nything else based upon the Court's question," to which both attorneys replied, "No."

¶9 Acuity then rested its case, and Property Image called Hassel in rebuttal. Hassel maintained that Offerdahl's classification of Voit as a carpenter was incorrect because all of Property Image's employees were "titled as general maintenance technicians," and Voit did not have "any licenses or training in carpentry," was not a member of any carpentry union, and was not "paid at a carpenter's rate." Prior to the disputed policy period, Hassel explained that Property Image had never had any employee classified as a carpenter and had not had any employee so classified since. Instead, all Property Image employees had been classified as "building and property management." Hassel testified that Property Image was not notified that Voit's classification would change after the first audit. Instead, the first indication Property Image had that Voit would be reclassified—putting Property Image on the hook for additional premiums—was after the second audit, "three months after the end of the [second] audit period."

¶10 Acuity questioned Hassel about Offerdahl's two audit reports for the policies in question. Acuity's counsel asked Hassel if she thought that Voit should be listed under code 9015 "Buildings or Property Management" instead of carpentry under code 5403, and Hassel responded, "Yes." Acuity's counsel then followed up and asked whether Hassel believed that additional amounts would be owed once Voit was added under code 9015 as a property management employee. Acuity's counsel specifically asked whether the premium currently listed on the two audit reports for code 9015 should be increased by $2544.67 and $813.69 respectively, and Hassel responded in the affirmative.

¶11 After the close of evidence, Acuity argued that Voit was properly classified as a carpenter and therefore Property Image should be required to pay the full premium as reflected in the bills for the respective policies received after Offerdahl's second audit. Acuity's counsel argued in the alternative that even if Voit should have been classified under property management, "apparently the parties are in agreement that there is a total of $3318.36 owed from my quick math in the courtroom." Despite the extended inquiries by the court and opposing counsel into whether Acuity was required to notify Property Image about Voit's classification change after the first audit, Acuity did not address the issue.

¶12 Property Image argued that Offerdahl's audit incorrectly classified Voit as a carpenter and "appears to be an … aberration of historically what's happened before and what has happened after the audits." Picking up on the court's interest in whether Property Image had been properly notified about the classification change before it was billed, counsel noted that Property Image "was never notified of the reclassification during the entire" year following the first audit. Counsel emphasized that the first time Property Image was apprised of the classification change was when they were billed for the additional amount after the second audit. Therefore, Property Image "dispute[d]" that the $7742 was owed.

¶13 The court agreed with Property Image, reasoning as follows:

> What doesn't make sense is how the Plaintiffs could do the audits; decide to reclassify someone and somehow they never told anyone. They aren't saying it. And maybe it's not this witness's fault, maybe the agent is supposed to tell them but somebody needs to tell them they are going to reclassify this person. [Property Image's office manager] told us he is a carpenter. But you have to be honest and say it will cost you more and that way the client Property Image could say that was a misunderstanding or they could talk about it. But that discussion never happened because nobody ever told them that information. They went through another year and they had no idea anybody would

> be reclassified and then they get the bill three months later, that's when they find out about it. So they didn't have a chance to talk about it or discuss it. I don't know how they can be expected to pay.
>
> Therefore, the Court will do what the Court Commissioner did and dismiss this case.

¶14 Acuity responded to the court's decision by arguing that Property Image still owed an additional premium for Voit under the maintenance classification, and the following exchange took place:

> THE COURT: I'm not understanding how that would be. I thought this amount was extra because of the carpenter.
>
> [ACUITY'S COUNSEL]: The evidence was and the witness for defense confirmed this as well, the evidence showed that the basis of it should go—even if it's not to the carpenter it should be added today to the general maintenance. That's where we came up with the $2,544.67. The parties are in agreement that at least that much is owed for the general maintenance. The only question is whether or not it is carpentry.

However, Property Image's attorney clarified that the parties did not, in fact, agree on this point.

> [PROPERTY IMAGE'S COUNSEL]: They have not done that, they have not sent us a bill reflecting where they think this person should be classified other than the one at issue in this case. Our position is nothing else is owed.
>
> THE COURT: Was anything paid for this gentleman for his worker's comp?
>
> [ACUITY'S COUNSEL]: No, Your Honor. The answer is no. There was no premium at all paid for this gentleman. The witness testified that it was their position that there is that amount owed because he should be appropriately classified as, in their opinion, under the 9015 standard.
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> [PROPERTY IMAGE'S COUNSEL]: We have not received a bill for that, we don't know what if anything they are reclassifying him to or what amount would apply. There are different rate codes from what they showed

> during this time versus the time in question. We don't have a bill for that amount.

The court responded that if Acuity "had sent a bill" with the maintenance classification it "would be easy for the Court," but in light of the evidence, the court declined to "order anything at this time." Acuity appeals from the circuit court's order.

DISCUSSION

¶15 Acuity makes two arguments on appeal. First, it contends that the circuit court erred when it concluded that Acuity was required to provide notice to Property Image that Voit was being reclassified as a carpenter. Though Acuity did not refer to the specific terms of the insurance policy at trial, it now claims that the written policies contain no requirement that Acuity notify Property Image of a classification change. Thus, it reasons, "[t]he trial court was simply mistaken when it concluded that Acuity was required to provide notice to Property Image before exercising its rights under the" policies. Second, Acuity insists that the circuit court erroneously concluded that Acuity was required to send a bill for the maintenance classification in order to collect the premium for Voit. Property Image responds that Acuity's first argument has been forfeited because Acuity failed to argue the point at trial.[4] As to the second argument, Property Image contends that the circuit court's conclusion that Acuity failed to adequately prove the amount it was entitled to should be affirmed because it is not clearly erroneous. We agree with Property Image on both points.

[4] Property Image also argues that the evidence supports the circuit court's conclusion that Acuity was required to give notice. However, as we affirm the circuit court's dismissal for other reasons, we need not address this argument.

¶16 After a bench trial, we will not set aside the circuit court's findings of fact unless those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). "While acting as the finder of fact, the trial court is the ultimate arbiter of the credibility of witnesses." ***Stevenson v. Stevenson***, 2009 WI App 29, ¶14, 316 Wis. 2d 442, 765 N.W.2d 811. Given this deferential standard of review, when the evidence is capable of multiple conflicting, but reasonable, inferences, we are bound to accept the inference drawn by the circuit court. *See* ***id.***

¶17 As a general rule, we do not consider arguments raised for the first time on appeal. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶¶23-27, 338 Wis. 2d 114, 808 N.W.2d 155. The rationale for this rule is simple: "failure to bring a matter to the trial court's attention denies the trial court an opportunity to rule on the matter after consideration." ***State v. McMahon***, 186 Wis. 2d 68, 93, 519 N.W.2d 621 (Ct. App. 1994). The rule recognizes the importance of avoiding unnecessary disruption of the judicial process by allowing the circuit court the opportunity to address any objections in the first instance. *See* ***Townsend***, 338 Wis. 2d 114, ¶26. Requiring a party to raise all arguments in the circuit court also gives the opposing party notice and an opportunity to address the objection and advance any rebuttal theories. *See* ***id.***

¶18 The basic thrust of Acuity's first argument is that the insurance policies themselves contain no requirement that it provide notice of a classification change, and therefore, the circuit court erred by finding that lack of notice precluded Acuity from recovering. However, Acuity failed to make this argument before the circuit court. And Acuity had ample opportunity to address whether it had any obligation, contractual or otherwise, to provide notice of Voit's pending classification change. Therefore, we decline to address this argument and conclude it has been forfeited.

¶19 If the circuit court's conclusion had been a surprise to the parties, this court would be less willing to apply forfeiture. But it was not. The court questioned Offerdahl specifically about whether Acuity had an obligation to provide notice, and Offerdahl testified that Property Image "should [have been] told" that Voit would be reclassified as a matter of "protocol." Acuity's counsel proceeded with redirect, but failed to further clarify Offerdahl's testimony concerning Acuity's notice obligations. The court again questioned Offerdahl after Acuity's redirect concerning notice and then specifically asked the parties whether they had anything to add in light of the court's questioning, and Acuity responded that it did not. Property Image brought up the issue of notice in its closing argument; Acuity did not. Not once prior to the circuit court's ruling did Acuity suggest that it was not obligated to provide notice, despite testimony from its own witness suggesting that such an obligation existed and clear interest by the court in the question. The circuit court even stated in its questioning, "That's the gist of the whole trial here." Once the circuit court dismissed Acuity's claim on the notice issue, Acuity again had the opportunity to argue the terms of the contract, but it failed to do so.

¶20 Because Acuity declined to raise the contract's requirements as to notice during trial, we are left somewhat in the dark as to the role notice played in the court's ruling. The court could have interpreted Offerdahl's testimony as relevant in interpreting the policies, which is wholly permissible if the contract is ambiguous.[5] The court's reference to Acuity's obligation to treat Property Image with honesty could also indicate that the court concluded that failure to notify

[5] *See* ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶32, 330 Wis. 2d 340, 793 N.W.2d 476 (extrinsic evidence may be used to interpret ambiguous contractual terms).

Property Image that Voit would be reclassified violated the duty of good faith and fair dealing implied in every contract.[6] The court also could have treated Offerdahl's testimony—again, Acuity's own witness—as establishing that notice is required under the contract, a conclusion Acuity never rebutted or cast doubt upon. While Acuity did introduce the terms of the insurance policies into evidence, it did not specifically refer to any of their terms.[7] Acuity's failure to argue the specific terms of the policies deprived the circuit court of the opportunity to correct any alleged erroneous interpretation. *See* ***Townsend***, 338 Wis. 2d 114, ¶26. Acuity's own failure to argue the terms of the policies on a point the circuit court clearly found to be critical to the trial created the very ambiguity in the record it now seeks to exploit. *See* ***id.*** (forfeiture rule prevents a party from "sandbagging" opposing counsel by deliberately failing to object to an error and later claiming that error is grounds for reversal (citation omitted)).

¶21 Apparently recognizing this problem, Acuity responds in its reply brief that its argument is really a question of the sufficiency of the evidence, which need not be raised at trial to preserve the issue for appeal.[8] *See* WIS. STAT. § 805.17(4). However, Acuity is not raising a challenge to the sufficiency of the

[6] *See* ***Beidel v. Sideline Software, Inc.***, 2013 WI 56, ¶27, 348 Wis. 2d 360, 842 N.W.2d 240 (every contract implies a duty of good faith and fair dealing).

[7] Exhibit 9 (the terms of the policies) was only briefly referred to at trial, and the reference merely identified the content of the exhibit. The exhibit was never specifically referred to again.

[8] Acuity does attempt to distinguish the particular forfeiture case relied upon by Property Image, but it does not appear to make any argument that the general principles of appellate forfeiture (which are well established) do not apply. To the extent Acuity offers any additional reason the forfeiture rule does not apply here, it has failed to develop an argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

evidence—or at least, it did not do so in its brief-in-chief before us. Its argument is one of contract interpretation that certainly could have been raised below. Under these circumstances, forfeiture is appropriate.[9]

¶22 Turning to Acuity's second objection, we conclude that the circuit court's decision not to order any payment "at this time" was not clearly erroneous. Acuity suggests that the circuit court made some sort of finding that Property Image's payment obligation was somehow preconditioned on Acuity sending a bill. We read the circuit court's decision differently. After Acuity argued that it was entitled to an additional premium based on a maintenance classification, Property Image pointed out that Acuity had not introduced definitive evidence of the amount due. The circuit court did not, as Acuity suggests, conclude that Acuity had to send a bill to be entitled to a premium. The court merely remarked that a bill would have made this an "easy" question and declined to order anything further. We read this as the circuit court concluding that Acuity had not proved its damages for the lesser classification with the requisite degree of certainty. *See* ***Thorp Sales Corp. v. Gyuro Grading Co.***, 107 Wis. 2d 141, 152-53 & n.25, 319 N.W.2d 879 (Ct. App. 1982) (citing the RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981) and explaining that damages for breach of contract are limited to those established to a reasonable certainty).

¶23 Given the evidence at trial, the circuit court's conclusion was not clearly erroneous. Acuity points to Hassel's answers on cross-examination acknowledging that additional amounts may be due. While Hassel's testimony

[9] Of course, the forfeiture rule is one of administration, not jurisdiction. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶¶23-24, 338 Wis. 2d 114, 808 N.W.2d 155. But Acuity has failed to make a case that addressing its claim despite forfeiture is fitting here.

suggests that the parties might agree that some additional premiums are due, Property Image's counsel pointed out that the specific amounts had not been definitively determined. The court was well within its role as a fact finder when it concluded that Acuity had not proved its case. It was not bound to accept any particular witness's testimony, and it specifically noted the lack of documentation presented by Acuity. The circuit court was not persuaded by the limited questioning of Hassel—an owner of Property Image who may or may not have specific knowledge of Acuity's rates for different classifications and how those rates may have changed over time.

¶24 Acuity's own apparently changing position further supports the court's conclusion that Acuity failed to prove its damages to a reasonable certainty. At trial, Acuity's counsel suggested that "the parties are in agreement that there is a total of $3,318.36 owed" under the "general maintenance" classification. But Hassel's testimony, which Acuity relies upon to establish the amount owed, indicated that Voit's premiums should have been increased by $2544.67 and $813.69 respectively, which totals $3358.36. Perhaps counsel's "quick math … in the courtroom" was simply mistaken. But Acuity introduces further confusion by requesting a third amount on appeal. It now claims that the evidence established that it was entitled to an additional $2575.67, a number never specifically mentioned by any witness. Given the somewhat confusing evidence and the lack of specific documentation justifying the $2575.67 Acuity now requests, we cannot conclude that the circuit court's finding that Acuity failed to prove damages was clearly erroneous. It was Acuity's responsibility to prove its damages through the evidence presented, and the court determined that it had failed to do so.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.