STATE OF WISCONSIN

I N S U P R E M E C O U R T

Appeal No. 18 AP 458

EMER'S CAMPER CORRAL, LLC,

Plaintiff-Appellant-Petitioner,

v.

MICHAEL A. ALDERMAN, ALDERMAN, INC.
d/b/a JENSEN-SUNDQUIST

INSURANCE AGENCY AND WESTERN HERITAGE INSURANCE COMPANY,

Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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On appeal from the Circuit Court
of Burnett County, Hon. Melissia R. Mogen,
Circuit Judge, presiding; and the Court of Appeals, Dist. III.

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ISSUE FOR REVIEW

1. In a suit for negligent failure to procure requested insurance coverage does Wisconsin law require a plaintiff to prove causal damages by showing she would have been able to personally obtain insurance coverage equal to or better than the coverage requested of the agent?

The trial court and court of appeals answered: "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are requested.

STATEMENT OF THE CASE

Rhonda Emer (Emer) and her husband are co-owners of Emer's Camper Corral, LLC, a business selling new and used camper trailers. (107: 85, 87-88). Emer was responsible for the business side of their operation including insurance coverage. (107:90). Emer first purchased insurance from Michael Alderman in 2004 when her business needed to insure a recently completed building. (107:95, 98). At the time, Emer's camper business consisted primarily of low cost used campers, so insuring her inventory was not cost-effective. (107:101). By 2007, however, Emer began selling more and more new campers. Emer obtained her first "garage" policy through Alderman in September of 2007. This policy insured her inventory with a $500 deductible from hail damage. (107:102).

Emer renewed her garage policy annually and was insured when hail struck in May of 2011. The hail caused extensive damage to her inventory. (107:103). She made a claim on about 20 units and was paid approximately $100,000.00 after her $500 per unit deductible. (107:108). Despite the claim, the insurer renewed the policy with the same deductible in September of 2011. (107:110, 111). Unfortunately, hail hit Emer's business property again in the summer of 2012, causing damages of roughly $100,000.00 after her deductible. (107:111, 114). The insurer paid the claim but this time gave Emer a notice of non-renewal. Alderman advised Emer he should be able to find replacement coverage but would have to shop in "other markets." (107:115). Before her nonrenewed policy expired in September of 2012, Alderman found a company (Western Heritage) willing to insure Emer but the deductible would be $5,000 per unit. (107:117, 119). Emer agreed to this policy over the phone without seeing any documentation. (107:119). Alderman couldn't make any promises but was confident he could get the deductible down to $1,000 upon renewal if Emer was claims-free for a year. (107: 134-

135, 136).

In August of 2013 Alderman called Emer with "great news." For her renewal in September of 2013, Western Heritage would offer a $1,000 hail deductible with a $5,000 deductible cap. (107:137, 147).

The following week Alderman sat down with Emer and reviewed the summary page from Western Heritage he had previously mailed her. (107:141; 108:78, 80; 77:1-2 (A:11-12)). Under the column heading "Deductible," the summary listed "Dealers Phys Dam:" as "Comp & Coll 1000/5000." (107:154; 77:2 (A:12)). The "Phys Dam" for "Scheduled Auto" was listed as "1000 Comprehensive and Collision." *Id.* Nothing in the summary suggested that damages from hail carried a $5,000 per unit deductible. Emer specifically asked Alderman if he was sure the hail deductible was $1,000 per unit, and he responded by pointing to the "Comp & Coll 1000/5000" provision on the summary page:

> …he said I am going back down to $1,000, and I had some questions about what the $1,000/$5,000 meant, comp/collateral $1,000/$5,000. He said that's a maximum aggregate, and I didn't understand what the term aggregate meant. …. He said, well, it's a maximum top limit. I said, okay, does it pertain anything to hail damage, what is my deductible for comp, which covers such things as hail and wind, earthquake, flood? And he said it's $1,000.

(117:156, 158). The meeting took about 20 minutes. Emer agreed to take the policy. (107:164). Alderman did not send any letters to confirm. Further, Emer did not receive a copy of the policy. (107:159, 163). Emer was not overly concerned because she had a copy of the written summary. (107: 164). In addition, when she went to Alderman's office in late September of 2013 to pay the premium, she spoke with MacKenzie Dahl, another agent in Alderman's office. Dahl confirmed the hail deductible was $1,000 per unit. (107:187, 188).

In his testimony Alderman agreed he meet with Emer in August of 2013 and went through the "quote sheets" he had provided her with his August 6, 2013 cover letter. He "believes" they discussed the

deductible. He "could have" told Emer the terms were the same as the year before, but "we really didn't go through the terms individually…." (108: 81, 84). He denied telling Emer the hail deductible was $1,000 per unit. (108:81, 109). He could not testify with certainty whether he told her there was a $5,000 deductible. He conceded the written summary showed a "Comp & Coll" of "1000/5000." The summary did not state there was a $5,000 deductible for hail and wind damage. (108:78, 82, 83).

In August of 2014 Emer had several phone conversations with Alderman about the upcoming September renewal. Alderman told Emer they were back in the "standard markets" and that he had two quotes, one from Western Heritage and the other from Erie, both with $1,000 per unit deductibles. (107:165-166). Alderman wanted to meet with Emer to discuss the offers. (107:166-167). Emer was hit by another hail-storm on September 3, 2014, however, and the meeting never took place. The Erie quote was withdrawn. (107:170). Western Heritage, on the other hand, could not withdraw its renewal offer:

> He said lucky for you that you also have a quote that I planned to share with you from Western Heritage that has that $1,000 deductible, and because your claim happened within 60 days of the renewal period, you are locked in on that $1,000 hail deductible because if they wanted to change that going forward, like to lesson (sic) a deductible, my understanding, as he put it, they would have to give you notice so you are fortunate to be locked in and not have to go backwards to a $5,000 per camper deductible.

(107:174). When Emer received Western Heritage's renewal quote on September 17, 2014, however, it contained a $5,000 per unit deductible. Emer emailed Alderman asking why the deductible wasn't $1,000 per unit consistent with the current policy. Alderman did not respond. (107:179). Eventually she told him she was retaining an attorney at which point he called her and asked, "What's this all about?" Emer asked why Alderman was giving her a garage premium summary that included the old $5,000 deductible when he told her she was locked-in to the same terms as the prior year going forward. (107:179-180). According to Emer, Alderman responded: "I saw that a couple weeks go (sic) ago, I thought that was odd, too. I'm going to

have to go back to my office and look into that…." (107:180). When Alderman called her back he said he had looked through his file and did not see a $1,000 deductible. The policies for 2012-2013 and 2013-2014 had the same $5,000 deductible. (107:180-181). He then provided Emer with the 2013-2014 Western Heritage policy, the first time she had seen it. (107:183).

Western Heritage paid Emer $65,000 on her 2014 claim after subtracting the $5,000 per unit deductible. (108:37). As the claim involved 25 individual campers, the deductible amounted to $125,000. As Emer had expected a $1,000 per-unit deductible with a $5,000 aggregate, she was out $120,000.00 (107:185).

Emer filed suit against Western and Alderman (and his agency) alleging mutual mistake and agent negligence. Western and Alderman filed motions for summary judgment.

In his motion Alderman argued he was not liable because Emer failed to show causal damages. Emer failed to show causal damages because she did not identify another insurance company that would have provided her with hail insurance coverage "applicable to the September 30, 2013 to September 30, 2014 policy period that contained a $1,000 deductible per camper." (30:3, 4).

Emer responded that an issue of material fact existed regarding whether: 1) Alderman was negligent in procuring the requested coverage; 2) Alderman misinformed Emer about the coverage he obtained; and 3) Alderman failed to inform Emer he did not obtain the coverage she requested. (36:5). As to damages, Emer argued Wisconsin law did not require her to prove she could have obtained the exact same coverage from another source for the same policy period. (38:3).

The circuit court denied Alderman's summary judgment motion but acknowledged the causal damages issue would probably be revisited at trial. (114:21-22).

The case went to trial. Before it was submitted to the jury

Alderman moved for a directed verdict pursuant to Wis. Stat. § 805.14(3). (67; 108:128). He alleged two grounds. First, he again argued Emer failed to prove casual damages. Whether Emer's claim was considered one for negligent procurement or negligent misrepresentation, she failed to show she "could have procured a policy insuring hail and windstorm from September 30, 2013 to September 30, 2014, which would have been in effect on the date of loss on September 3, 2014 with a $1,000 deductible and a $5,000 maximum deductible." (108:128-129). Second, as far as any negligence claim is concerned, Emer was required to produce an expert to establish the standard of care. (108:130-131). Other than a "simple failure to procure insurance coverage…there has to be some type of expert testimony setting forth the application (sic) standard of care in these circumstances." Alderman "acknowledge[d]" the alleged misrepresentations were a question of fact, "[b]ut for any other aspect of claim of negligence, then there would have to be expert testimony to establish a deviation from the minimum standard of care." It would be "speculation for this jury to conclude negligence other than this dispute about what was said and represented to Emer's Camper Corral in August of 2013." (108:131)

The circuit court agreed with Alderman, granted his motion for directed verdict, and excused the jury. (108:145-148; A:1-3). Three days later the circuit court filed a written decision and order. (86; A:4-10). The circuit court granted Alderman's "motion to dismiss" as a motion for summary judgment or, "alternatively," a directed verdict. (86:1 (A:4)).

The court granted Alderman's motion for two reasons: First, Emer failed to produce expert testimony establishing a standard of care for negligence. (86:4 (A:7)). Second, Emer failed to produce expert testimony showing she could have obtained the coverage Alderman allegedly misrepresented to her from another insurer and therefore failed as a matter of law to prove causal damages. (86:7 (A:10)).

Emer appealed. The court of appeals agreed with Emer that an

expert was not required to prove causal damages,[1] but affirmed the circuit court's dismissal based on Emer's failure to show she could have obtained a policy from another source with a deductible better than the $5,000:

> We conclude the circuit court properly granted Alderman a directed verdict. To prevail on its negligence claim, Camper Corral was required to prove that Alderman's conduct caused Camper Corral's damages—that is, that his conduct was a substantial factor in producing those damages. In order to do so, Camper Corral needed to establish that, but for Alderman's alleged negligence, Camper Corral could have obtained a policy that included a lower hail damage deductible than the policy Alderman actually obtained. Camper Corral failed to produce any evidence supporting a conclusion that it would have been able to obtain such a policy, absent Alderman's alleged negligence. As such, Camper Corral could not establish, as a matter of law, that Alderman's conduct was a cause of its damages. We therefore affirm the circuit court's decision granting Alderman a directed verdict.

(COA Decision, ¶¶2, 14, n. 6 (A:14, 20)). The court of appeals declined to address whether an expert was necessary to establish a standard of care. (COA Decision, ¶2, n.1 (A:14)).[2]

1 COA Decision, ¶14, n. 6 (A:20).

2 "Because we affirm on the basis that Camper Corral failed to prove that Alderman's conduct caused its damages, we need not address the parties' arguments as to whether Camper Corral was required to produce expert testimony regarding the standard of care. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716." (COA Decision, ¶2, n1 (A:14)). Emer did not raise this issue in her Petition for Review as presumably it would be remanded to the court of appeals for a decision in the event this Court reversed on the causal damages issue. Alternatively, the claim is meritless. Assuming the facts most favorably to Emer, there is no dispute Alderman failed to obtain the coverage requested and worse, misrepresented the coverage he did obtain. Emer did not need expert testimony to establish a standard of care. Nothing could be more basic than requiring an agent to accurately represent the terms of the policy, especially when obtaining a low deductible was the primary goal Emer and Alderman discussed. Emer would be happy to argue the issue further in the event the court chooses to address it.

I. WISCONSIN LAW DOES NOT REQUIRE EMER TO PROVE CAUSATION BY SHOWING SHE COULD HAVE OBTAINED THE SAME OR BETTER POLICY FROM ANOTHER SOURCE.

Emer alleged Alderman was negligent for failing to procure requested insurance and misrepresenting the coverage he obtained.[3] Damages for negligent procurement and negligent misrepresentation[4] are governed by the "out-of-pocket rule." *Gyldenvand v. Schroeder*, 90 Wis. 2d 690, 697-98, 280 N.W.2d 235 (1979). The "out-of-pocket rule" compensates for actual loss. *Gyldenvand*, at 697-698. A plaintiff must show defendant's negligence was a "substantial factor" in producing the loss. *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶24, 277 Wis. 2d 21, 690 N.W.2d 1. The proper measure of damages presents a question of law. *Schorsch v. Blader*, 209 Wis. 2d 401, 405, 563 N.W.2d 538 (Ct. App. 1997).

Both the circuit court and the court of appeals acknowledge that no Wisconsin case has explicitly addressed whether a plaintiff alleging negligent failure to procure must prove causal damages by showing he or she could obtain alternative coverage. (COA Decision, ¶19 (A:22-23)). The circuit court, after reviewing case law "from other jurisdictions," concluded that Emer did have to make such a showing. Emer had to show she could have obtained a policy during the same

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3 The court of appeals declined to consider any claim other than negligence or negligent misrepresentation. Negligence was the only claim expressly pled in the complaint although Emer did raise negligent misrepresentation pre-trial. (114:17). The court of appeals rejected Emer's post-trial summary judgment analysis and reviewed the circuit court's ruling solely as a directed verdict per Wis. Stat. § 805.14. (COA Decision, at ¶12 (A:19)). Any claim based on breach of contract or strict responsibility misrepresentation was deemed forfeited. (COA Decision, ¶¶25-27 (A:26, 27)). See Section II., *infra*.

4 The elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it. See *Ramsden v. Farm Credit Servs. of N. Cent. Wis. ACA*, 223 Wis.2d 704, 721, 590 N.W.2d 1, 7 (Ct.App.1998); WIS JI—CIVIL 2403. Alderman acknowledges the complaint supports a negligent misrepresentation claim. (30:6; 67:2, n.1).

time period with a "$1,000.00 per auto/camper deductible and a $5,000.00 aggregate." (86:6 (A:9)). In reaching this conclusion, the circuit court misapplies nearly every case it cites.

The circuit court misapplied the case law because it failed to recognize the distinction between commercial availability and personal availability. Commercial availability means coverage generally offered in the insurance marketplace. It does not require a plaintiff to prove he or she could have obtained such coverage personally. This distinction is clearly present in the case law and other authority cited by the circuit court in its written decision. (86:5-6 (A:8-9)).

The circuit court, for example, cites *Anderson on Wisconsin Insurance Law*, Seventh Edition, Section 13.31, for the proposition that a plaintiff must "present *some evidence* that coverage would have been available if the agent had fulfilled its duty of care to the plaintiff…" (emphasis added). (86:5 (A:8)). *Anderson*, in turn, cites *Tri-Town Marine, Inc v. J.C. Milliken Agency, Inc.*, 924 A.2d 1066 (Me. 2007). *Tri-Town* makes clear, however, that "some evidence" of coverage does not require the plaintiff to prove he or she could have obtained better coverage personally. In fact, *Tri-Town* refused to decide whether a plaintiff had to show "availability of better coverage" as "an essential element of proof in this type of action." *Tri-Town*, 924 A.2d at ¶10. Rather, the court affirmed summary judgment on two grounds: First, the plaintiff was seeking to enforce coverage that did not exist in the commercial marketplace. *Tri-Town*, 924 A.2d at ¶8. Plaintiff could not produce "some evidence" of coverage availability because there was, admittedly, none to be had. Second, the plaintiff could not show detrimental reliance. There was no evidence the plaintiff could have avoided or mitigated the risk had it known coverage had not been secured. *Id*., at ¶11.

The circuit court also mistakenly relies on *Am. Motorists Ins. Co. v. Salvatore*, 102 A.D.2d 342, 476 N.Y.S.2d 897, 900 (N.Y. App. Div. 1984), *Johnson v. Higgins of Ala., Inc. v. Blomfield*, 907 P.2d 1371, 1374 (Alaska 1995), and *Bayly, Martin & Fay, Inc. v. Pete's Satire*, Inc., 739 P.2d 239, 244 (Colo. 1987). (86:5-6)

In *Salvatore*, the issue was whether an agent was liable for an inter-spousal claim not covered by the policy when the agent allegedly represented the policy afforded "coverage for every conceivable claim regardless of who asserted such claim,...." *Id*., at 346. The court affirmed summary judgment in the agent's favor because *no* "insurance company writing automobile policies in the State of New York provided inter-spousal coverage." *Id*.

In *Johnson & Higgins* the court articulated the "majority rule" requiring a plaintiff to show that "coverage was commercially available for the loss sustained…" *Id*., at 1374. This did not mean the plaintiff had to prove *he or she* could have obtained alternative coverage elsewhere. In fact, it was not clear the plaintiff had any burden at all. In "some jurisdictions, the absence of commercially available coverage is treated as an affirmative defense rather than an element of the plaintiff's case." *Id*., at 1374. The court did not have to decide who the burden belonged to or what level of proof was required of the plaintiff because plaintiff's proof at trial was more than enough to meet the most demanding test: plaintiff had presented an expert who testified it was more probable than not that another carrier would have provided coverage. *Id*.

The circuit court mistakenly relies on *Bayly, Martin & Fay, Inc. v. Pete's Satire*, Inc., 739 P.2d 239, 244 (Colo. 1987) as well. Again, *Bayly* held that a plaintiff need only show "that the type of insurance which he sought was generally available in the insurance industry…." (88:5 (A:8)). *Bayly* is clear, moreover, that proving commercial availability does not mean the plaintiff has to show *he or she* could have personally obtained the requested policy. *Bayly*, at 244. See also *Kabban v. Mackin*, 104 Ore. App. 422, 434, 801 P.2d 883, 891 (Ore. 1990) (plaintiff met burden of showing coverage "was generally available in the insurance industry" by showing there were insurance companies that offered coverage for a building in an unoccupied state); *Morgan Int'l Realty v. Dade Underwriters Ins. Agency*, 524 So. 2d 451, 452, (Fla. App. 1988) (causation standard is "whether the requested coverage was generally available in the insurance industry

when appellee obtained coverage for appellants."); *Hawk v. Roger Watts Ins. Agency*, 989 So. 2d 584, 591 (Ala. 2008) (coverage was not "available" to the plaintiff because the coverage he wanted was not "available from *any* insurance provider" (emphasis added)).

Other states have placed the burden of proving unavailability on the agent. *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 499 (4th Cir. 1998), citing *Patterson Agency, Inc. v. Turner*, 372 A.2d 258, 261 (Md. Ct. Spec. App. 1977) ("[t]he burden of proving the nonavailability of insurance coverage is on the insurer or the broker, because it is an affirmative defense that is within the peculiar knowledge of those familiar with the market. *See Patterson*, 372 A.2d at 261. Furthermore, a broker cannot meet its burden of showing a lack of proximate cause between its failure to properly procure insurance and the insured's lack of coverage merely by showing that the insurer which it approached would not supply the insurance in question").

In addition, many courts apply the benefit of the bargain rule in failure to procure cases as a matter of course: "[d]amages for a broker's failure to procure or maintain insurance are determined by the policy that the broker failed to procure." *Lazzara v. Howard A. Esser*, Inc., 802 F.2d 260, 266 (7th Cir. 1986) (applying Illinois law). Whether an insurer would have issued the policy "is immaterial" if the broker failed to notify the applicant of the discrepancy. *Id*. See also *Pete's Satire, Inc. v. Commerical Union Ins. Co.*, 698 P.2d 1388, 1391 (Colo. 1985) (in assessing damages based on an insurance agent's negligence and failure to procure coverage, the measure is the amount of coverage promised). See also the cases cited in *O'Daniel v. Stroud NA*, 604 F.Supp.2d 1260, 1261-1262 (W.D.S.D. 2008).

While the circuit court misapplied these holdings, the court of appeals ignored them. Rather, the court of appeals adopted the reasoning of a single Minnesota Court of Appeals' decision. See *Melin v. Johnson*, 387 N.W.2d 230 (Minn. Ct. App. 1986). In *Melin*, the owner of a small business sought to procure a group health insurance plan that would cover him and his employees despite his pre-existing heart condition. His agent, Johnson, obtained a policy

and told Melin he was "covered" without discussing whether the benefits were any different for those with pre-existing conditions. When Melin subsequently became disabled and found out the coverage differed, he sued Johnson for negligent procurement and negligent misrepresentation. *Id*., at 232. The court agreed Johnson was negligent for failing to inform Melin the policy he procured did not meet his known expectations. *Id*., at 232-233. Melin failed to prove "proximate cause," however, because there was no evidence "that a better policy was available." *Id*.

The court of appeals also cited one Wisconsin case in support of its holding. In *Wallace v. Metropolitan Life Insurance Co.*, 212 Wis. 346, 347, 248 N.W. 435 (1933), the decedent's life insurance application was rejected because he was "affected with mitral regurgitations of the heart." He was never notified of the rejection, however, and died two months later. *Id*., at 348. The administrator of his estate sued the insurer, arguing Metropolitan life was liable under the policy for failing to give proper notice of rejection. The suit was dismissed. The administrator-plaintiff failed to prove causal damages because "there was no evidence *tending to show* that [decedent] could have obtained other insurance of the same kind and character" due to his medical issues. *Id*., at 350.

The court of appeals thus reasoned that Alderman's conduct was not a "substantial factor" in producing Emer's damages unless "[Emer] would have been able to obtain a policy containing a hail damage deductible lower than $5,000 per unit." (COA Decision, ¶18 (A:21-22)) (86:6 (A:9)). "[I]n order to prevail on its negligence claim, [Emer] was required to prove that [she] would have been able to obtain a policy containing a more favorable hail damage deductible absent Alderman's negligence." *Id*., at ¶24. As no such evidence was produced, the claim failed. *Id*.

At least two Wisconsin cases have approved failure to procure claims without proof of alternative coverage, although the issue was not explicitly addressed. See *Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.*, 185 Wis. 2d 791, 809, 519 N.W.2d 674 (Ct. App. 1994) ("damages arising out of a broker's failure to procure insurance

are commonly determined by the terms of the policy the agent failed to procure") and *Rainer v. Schulte*, 133 Wis. 130, 133, 113 N.W.2d 396 (1907) (whether an agent could bind an insurer with his representations is irrelevant, as he or she "certainly [has] authority to bind himself…."). The court of appeals distinguishes these cases by assuming the lack of discussion means there was no dispute alternative coverage was available. (COA Decision, ¶¶19, n.5 (A:22-23)). That assumption, however, has no basis in fact.

Even in *Wallace*, the 86-year-old Wisconsin case relied upon by the court of appeals, the holding is far from categorical on what a plaintiff must prove. The plaintiff failed to prove causal damages because "there was no evidence *tending to show* that [decedent] could have obtained other insurance *of the same kind and character*" due to his medical issues. *Id*., at 350. (emphasis added). The Court did not expressly require the plaintiff to prove he could have obtained better coverage. What evidence would "tend[] to show" the plaintiff could have obtained an alternate policy is open to interpretation. Arguably, the Court's holding is not inconsistent with having to produce "some evidence" that coverage is generally available in the commercial marketplace.

The majority rule requiring "some evidence" of commercial availability draws a fair line. It avoids the problem of holding insurance agents liable for risks no one will insure, while at the same time does not impose the difficult task of having to retroactively prove—often years later—that an individual plaintiff could have obtained a better policy during the policy period at issue. There is no dispute a $1000 (or better) deductible was commercially available in the insurance marketplace at the time Emer suffered her loss. In fact, Emer testified she had a policy from 2007 to 2012 with a $500 deductible. (107: 102, 103, 108, 110-111). Alderman testified that on June 18, 2014 he received an offer to insure Emer with a $1000 deductible. (108:96-97).

Alternatively, both *Wallace* and *Melin* are distinguishable for another reason. Both involved highly individualized medical coverage decisions tied directly to an applicant's health. Casualty

insurance is different, as the plaintiff may choose to avoid or at least mitigate the uninsured risk if he or she knows the coverage is not what he or she wanted. In other words, a plaintiff may show causal damages based on reasonable reliance.

Melin's holding was qualified by the Minnesota Supreme Court for this reason. In *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45 (Minn. 1989) the owner of a snowmobile, Becker, requested full coverage from his insurance agent for himself, his daughter and his son-in-law. The agent agreed to provide the requested coverage. *Id*., at 46-47. The daughter was later injured when the snowmobile, negligently driven by the son-in-law, was hit by a car. Coverage was denied by the insurer based on the policy language. Becker brought suit against the agent for negligent failure to procure. The agent cited *Melin*, arguing that proximate cause was not proven because the plaintiff failed to show Becker could have obtained another policy that would have provided the coverage requested. The Minnesota Supreme Court rejected the agent's argument. *Melin* did not apply, it held, because Becker could have elected to not engage in the uninsured activity. Therefore, "liability attaches independently of whether any insurance policies would have provided the requested coverage." *Id*., at 49; see also *Certain Underwriters at Lloyd's London Subscribing to Policy No. LL001HI0300520 v. Vreeken*, 329 P.3d 354 (Haw.App. 2014) (2014 Haw. App. LEXIS 332, at 13) ("To require plaintiffs to establish the availability of alternative insurance coverage in all cases involving negligent failure to procure a policy would require more than what the 'substantial factor' test requires. *Even if a plaintiff would have been unable to obtain alternative coverage, an insurance agent's failure to notify the plaintiff that the agent was unable to obtain coverage,… could still be a 'substantial factor' causing the plaintiff's damages* (emphasis added))."

Like the insured in *Runia*, Emer could have elected to not engage in the uninsured activity—or at least taken steps to mitigate her exposure. Had she known her coverage was subject to a $5,000 per unit deductible, she could have reduced or eliminated her on-site inventory. She could have stored her units under cover. She could have made different delivery arrangements with her supplier. She

could have stopped selling new units. As Emer had the ability to minimize or even eliminate her uninsured risk, her reliance on Alderman's claim she had a $1,000 per unit deductible was a "substantial factor" in causing her damages. Liability attached "independently of whether any insurance policies would have provided the requested coverage." *Runia*, at 49.

Both the circuit court and the court of appeals erred because they applied the wrong legal standard. At most, Emer was required to produce evidence of commercial availability. She did so when both she and Alderman testified to facts showing the coverage she sought was generally and commercially available. Alternatively, Emer's damages are not dependent on whether she could have obtained alternative coverage. Had she known what her coverage was, or was not, she could have avoided damages by choosing not to engage in the uninsured activity or taken steps to mitigate the risk.

II. ALTERNATIVELY, EMER WAS ENTITLED TO DAMAGES UNDER THE BENEFIT OF THE BARGAIN RULE BECAUSE THE FACTS OF THE COMPLAINT STATED BREACH OF CONTRACT AND STRICT RESPONSIBILITY MISREPRESENTATION CLAIMS.

The circuit court characterized Alderman's motion at trial as a motion for "summary judgment" or, "alternatively," as a directed verdict: "Alderman argues that the Court should grant summary judgment in this case, or in the alternative, a directed verdict, because Camper Corral failed to call an expert witness to testify at the trial regarding the standard of care for insurance professionals *or relating to causation and damages*;…." (emphasis added) (86:2 (A:5)).

The circuit court correctly labelled its decision at trial as one for summary judgment because it reconsidered the very same causation argument Alderman made in his motion for summary judgment. (114:21; 86:4 (A:7)). The issue of causation, which the circuit court described as "a matter of law" (86:4 (A:7)), was vital to Emer's claim. The circuit court rejected Alderman's pre-trial summary judgment motion but did so without clearly deciding the causation issue.

(114:21-22). It may have done so implicitly when it denied the motion, but the court's language also suggests the question was left open. *Id*. Either way, when the court reconsidered the legal standard for causation, it effectively re-opened and modified its summary judgment decision.

The circuit court correctly characterized Alderman's motion as a motion for summary judgment for another reason: it relied on materials outside the trial record. In making his causation argument to the circuit court outside the presence of the jury, Alderman relied on an "affidavit from Ron Stone" as well as an "affidavit from Debby Williams." (108:129-130). The circuit court acknowledged its decision was based on testimony "received today…*as well as the transcript and documents provided*,...." (emphasis added). (108:148). A directed verdict under Wis. Stat. 805.14(4), on the other hand, is limited to evidence heard by the jury: "[i]n trials *to the jury*, at the close of all the evidence, any party may challenge the sufficiency of the evidence....". While the court of appeals acknowledged outside materials were referenced by the circuit court, it found they were immaterial because the circuit court did not "cite" them "in the portion of its decision addressing Alderman's argument regarding causation,…." (COA Decision, ¶13 (A:19)). Having considered these summary judgment affidavits, however, both of which were directly relevant to the causation issue, the circuit court's decision on causation was, in fact, one for summary judgment, regardless of whether these affidavits were specifically cited in the court's decision.

As a summary judgment motion, review is entirely de novo.[5] *Tikalsky v. Friedman*, 2019 WI 56, ¶10, 386 Wis.2d 757, 928 N.W.2d 502. This Court must apply the same methodology as the circuit court. *Id*. This requires the Court to liberally review the factual assertions in the complaint to determine whether a claim for relief has been stated. *Id*., at ¶11. A complaint's success "does not depend on accurate labelling." *Id*., at ¶14. A plaintiff's "theory of recovery" is

5 In addition, Wis. Stat. § 802.09 would have still been available to amend the complaint to conform to the evidence at trial as the trial had not yet reached the point of a jury instructions conference.

"not controlling." *Id*. Even a misidentified cause of action will not defeat a complaint if the facts, liberally construed, support a claim. *Id*.

Emer alleged in her complaint that she had "tasked" Alderman with obtaining insurance coverage without the $5,000 deductible. (1:5, ¶¶18-19). In turn, Alderman presented her with an "offer" from Western Heritage with a $1,000 deductible. He told Emer the $5,000 deductible had been removed. (1:4, ¶10). Emer accepted the policy with the understanding it did not have a $5,000 hail deductible. (1:5, ¶11). Alderman assured Emer the policy had a $1,000 hail deductible and not a $5,000 hail deductible. (1:5, ¶13). Despite Alderman's "assurances and Plaintiff's instructions to the contrary," Alderman placed insurance coverage for the 2013-2014 term with a $5,000 per unit deductible and no cap. (1:6).

Emer is not limited to a claim based solely on negligence. Her factual allegations give rise to at least four separate theories of recovery with two distinct theories of damages. A failure to procure may be based on common law negligence or breach of contract.[6] *Schneider v. Smith & Assocs., Inc.*, 206 Wis.2d 480, 486-87, 557 N.W.2d 445 (Ct. App. 1996); *Estate of Ensz*, 66 Wis.2d 193, 199, 223 N.W.2d 903 (1974). Misrepresenting coverage supports both negligent misrepresentation and strict responsibility[7] claims.

Wisconsin law applies "benefit of the bargain" damages to both breach of contract and strict responsibility misrepresentation claims. *Eklund v. Koenig & Assoc., Inc.*, 153 Wis.2d 374, 378-379, 451

6 A breach of contract claim consists of three elements: (1) an enforceable contract; (2) a breach of that contract; and (3) damages. *Brew City Redev. Grp., LLC v. Ferchill Grp.*, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582.

7 The elements of strict-responsibility misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it. *D'Huyvetter v. A.O. Smith Harvestore Prods.*, 164 Wis.2d 306, 336, 475 N.W.2d 587, 598 (Ct.App.1991); WIS JI—CIVIL 2402.

N.W.2d 150 (Ct. App. 1989) (applies to both); *Schurmann v. Neau*, 2001 WI App 4, ¶15, 240 Wis.2d 719, 624 N.W.2d 157 (applies to strict responsibility claim); *Wickenhauser v. Lehtinen*, 2007 WI 82, ¶17, 302 Wis.2d 41, 734 N.W.2d 855 (applies to breach of contract).

Benefit of the bargain damages do not require a plaintiff to prove alternatives would have been available. Rather, they are based on an "expectation interest." *Schubert v. Midwest Broadcasting Co.*, 1 Wis. 2d 497, 502, 85 N.W.2d 449 (1957). For breach of contract, the injured party "is entitled to the benefit of his agreement, which is the net gain he would have realized from the contract but for the failure of the other party to perform." *Thorp Sales Corp. v. Gyuro Grading Co.*, 111 Wis.2d 431, 438-439, 331 N.W.2d 342 (1983); WIS JI 3735. For strict responsibility misrepresentation, the injured party "is entitled to damages equivalent to what he would have received if the representation relied upon had been true." *Schurmann*, at ¶15.

Under either a breach of contract or strict responsibility misrepresentation claim Emer is entitled to what Alderman agreed to procure or, alternatively, what he represented he had procured, regardless of whether Emer could have obtained coverage elsewhere. Summary judgment cannot, as a matter of law, be based on Emer's alleged failure to produce evidence of other available policies.

Alternatively, Emer supplied proof of casual damages for a negligence claim when the evidence shows policies with $1,000 and $500 deductibles were commercially available.

CONCLUSION

This Court should reverse the circuit court's Order granting Alderman summary judgment (or a directed verdict) and remand the case for trial on the contested factual issues.

Respectfully submitted this 9th day of August 2019.

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), and that the text is:

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Dated this 9th day of August 2019.

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CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Wisconsin Supreme Court by First Class Mail on August 9th 2019. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 9th day of August, 2019.

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APPENDIX OF
PLAINTIFF-APPELLANT-PETITIONER

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No. 18-AP-458

State of Wisconsin
In Supreme Court

EMER'S CAMPER CORRAL, LLC,
Plaintiff-Appellant-Petitioner,

v.

MICHAEL A. ALDERMAN, ALDERMAN, INC., d/b/a JENSEN-SUNDQUIST INSURANCE AGENCY, AND WESTERN HERITAGE INSURANCE COMPANY,
Defendants-Respondents.

On Appeal from the Circuit Court of Burnett County,
Hon. Melissia R. Mogen, Circuit Judge, presiding; and
the Court of Appeasl, District III

BRIEF OF DEFENDANTS-RESPONDENTS MICHAEL A. ALDERMAN, ALDERMAN, INC. D/B/A JENSEN-SUNDQUIST INSURANCE AGENCY

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I. Whether the court of appeals and circuit court properly concluded that in a negligence claim against an insurance agent, causation must be established by evidence that the requested coverage was available in the marketplace and the insurance client was eligible for the requested coverage?

II. Whether the plaintiff bears the burden of proving both availability and eligibility in a negligence claim against an insurance agent?

III. Whether it is the insurance coverage an insured would have had, absent the insurance agent's negligence, that defines the measure of damages?

IV. Whether Camper Corral's argument regarding breach of contract or strict misrepresentation is improper because its petition for review was limited to the single issue of causation in a negligence cause of action?

STATEMENT ON ORAL ARGUMENTS AND PUBLICATION OF OPINION

Oral arguments are appropriate to allow Respondents-Defendants Michael A. Alderman and Alderman, Inc. d/b/a Jensen-Sundquist Insurance Agency (collectively and hereafter "Alderman") to respond to any new arguments raised by Appellant-Plaintiff, Emer's Camper Corral ("Camper Corral") in its reply brief. This Court's opinion should be published because it will enunciate and/or resolve conflicts regarding the evidence required to establish the element of causation in a professional negligence claim involving insurance agents.

STATEMENT OF THE CASE

Appellant-Plaintiff, Emer's Camper Corral ("Camper Corral"), brought suit against Respondents-Defendants Michael A. Alderman and Alderman, Inc. d/b/a Jensen-Sundquist Insurance Agency (collectively and hereafter "Alderman") alleging negligence in the procurement of an insurance policy.

A trial occurred on January 22 and 23, 2018, in which both parties submitted evidence. Camper Corral rested without introducing any expert testimony about the applicable standard of care or causation. After Alderman introduced testimony from Mr. Alderman and read portions of the deposition testimony of Camper Corral's expert, Robert Sutton. Alderman moved for directed verdict due to insufficient evidence. The circuit court granted Alderman's motion. Camper Corral did not move to amend its Complaint or assert any post-trial motions.

Camper Corral is appealing the circuit court's decision and the court of appeal's affirmance of the circuit court's decision.

STATEMENT OF THE FACTS

The sole cause of action Camper Corral asserted against Alderman is negligence. (Record No. 1.)

Camper Corral alleged "[t]he Agent had a duty to use reasonable care in its dealings with Plaintiff"; "[t]he Plaintiff tasked Agent with securing insurance coverage…without a $5,000 deductible for hail claims"; "[t]he Agent knew that the Plaintiff wanted insurance coverage without a $5,000 hail deductible"; "[d]espite the Agent's assurances and Plaintiff's instructions to the contrary, the Agent placed insurance coverage…that included a $5,000 hail deductible"; and "[b]y placing insurance with the wrong deductible, the Agent breached his duty of reasonable care to the Plaintiff, and the Plaintiff sustained damages as a result of Agent's negligence." (*Id.*)

Prior to the 2012-2013 policy period, Camper Corral was insured through General Casualty under a policy with a $500 per unit deductible. (Record No. 107, 101:13 – 102:6.)

Camper Corral experienced a hail event in May 2011 and a second hail event the summer of 2012. (Record No. 107, 114:7.) After the second hail event, General Casualty notified Camper Corral it would not be renewing the policy for the 2012-2013 policy period. (Record No. 107, 114:14-25.) Camper Corral's policy period ran from September to September.

Camper Corral relied upon a "floorplan" loan from the bank to fund and increase its camper inventory. (Record No. 107, 131:1-4.) During the 2012-2013 policy period, Camper Corral received a "floorplan" for $800,000, which was an increase from the previous years $500,000 loan. (Record No. 108, 12:15-17.) In April 2013, during the 2012-2013 policy period with a $5,000 per unit deductible, Camper Corral raised its coverage to $800,000 worth of camper inventory. (Record No. 107, 138:13-15.) The "floorplan" lender required Camper Corral to have insurance and the $5,000 per unit deductible policy through Western Heritage for policy period 2012-2013 satisfied this requirement. (Record No. 107, 133:3-17.)

Over the past eight years, Camper Corral had grown its business substantially and became the number one selling dealer for the Cherokee brand, a brand Camper Corral did not want to lose because it was the bestselling camper in the country. (Record No. 108, 32:13-24.)

Mr. Alderman described the methods insurance companies use to calculate premiums and eligibility for coverage, including claims history. (Record No. 108, 66:11-14, 69:1-24, 76:14-21.)

Camper Corral's expert, Robert Sutton, conceded that given Camper Corral's two prior hail losses in 2011 and 2012, Camper Corral would not have been able to get a policy for the 2013-2014 policy period with a $1,000/$5,000 aggregate deductible for wind and hail. (Record No. 108, 135:6-137:17.) Portions of Sutton's deposition testimony were read into the record at trial. Sutton was asked, "[s]o during the September 30, 2013 to September 30, 2014, policy, now that you have been provided with the amount of the two previous claims, do you think it's possible to get a policy with a $1,000/$5,000 aggregate deductible for wind and hail." (Record No. 108, 137:11-16.) He answered "No." (*Id.*, at 137:17.)

ARGUMENT

I. STANDARD OF REVIEW

A defendant may move for dismissal at the close of evidence on the ground of insufficiency of the evidence. Wis. Stat. § 805.14(4). If a party mis-designates a motion, "the court shall treat the motion as if there had been a proper designation." Wis. Stat. § 805.14(2)(b).

"An appellate court should not overturn [the] circuit court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was 'clearly wrong.'" *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 389, 541 N.W.2d 753, 761 (1995); Wis. Stat. § 805.14(3). "We review de novo the grant or denial of summary judgment and apply the same methodology and standards as the circuit court." *Town of Grant v. Portage Cty.*, 2017 WI App 69, ¶ 8, 378 Wis. 2d 289, 295, 903 N.W.2d 152, 155.

The evidence admitted into the record at trial does not establish the requisite negligence element of causation, therefore, the circuit court properly entered judgment in

favor of Alderman and the court of appeals properly affirmed the circuit court's decision. This Court should also affirm because the circuit court's decision was correct.

II. IN A NEGLIGENCE CLAIM AGAINST AN INSURANCE AGENT, EVIDENCE OF BOTH AVAILABILITY IN THE MARKETPLACE AND ELIGIBILITY FOR THE COVERAGE REQUESTED IS NECESSARY TO ESTABLISH THE ESSENTIAL ELEMENT OF CAUSATION

"General" or "commercial" availability in the marketplace is not sufficient to establish causation of damages in a claim for negligent procurement or misrepresentation by an insurance agent. In all the cases reviewed by Alderman, even those cited by Camper Corral, where the court was analyzing causation, the courts required evidence that the coverage was available in the marketplace and evidence that the plaintiff/insured was eligible for the coverage purportedly requested to establish the element of causation in a negligence claim against an insurance agent. In other words, "availability and eligibility" is necessary to establish the element of causation. While jurisdictions are split on who bears the burden of establishing availability of coverage and eligibility for coverage, at the end of the day, if the plaintiff/insured was not eligible for the requested insurance, the element of causation fails.

Wisconsin applies the substantial factor test in determining causation in a negligence case. *Estate of Cavanaugh v. Andrade*, 202 Wis. 2d 290, 306, 550 N.W.2d 103 (1996). "[T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." *Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.*, 176 Wis. 2d 740, 788, 501 N.W.2d 788, 807 (1993) (quoting Restatement (Second) of Torts § 432(1) (1965)).

A. The majority of jurisdictions require evidence of availability of the requested coverage as well as eligibility for the requested coverage to establish a negligence claim against an insurance agent.

In reaching their respective decisions, both the circuit court and court of appeals relied upon *Melin v. Johnson*, 387 N.W.2d 230 (Minn. Ct. App. 1986) *rev. denied* Jul. 31, 1986. It reflects the consensus among the jurisdictions as to the element of causation.

In *Melin,* the court held that the agent's negligent failure to inform the insured of the limitations in the policy that was obtained was not the cause of insured's injuries because the undisputed evidence showed the insured "would not have been able to secure other comparable insurance." *Id*., at 233. The plaintiff-insured, a 44-year-old with a history of heart issues, sought disability insurance but was informed he was not insurable because of preexisting health issues. *Id*., at 231. The agent suggested a group policy for the insured's employees through which the insured could get disability coverage. *Id*. A group policy was procured. *Id*. Due to some limitations in the policy, the insured only received 30% of his income through the disability policy and for six months. *Id*. The insured believed he was getting a disability policy which paid 60% of his income for five years. *Id*. The court held that even assuming that the insurance agent was negligent in informing the insured of limitations of the insurance policy actually procured, the negligence "does not result in [the insured] suffering the loss of his bargain unless there was evidence of other available coverage, and there was no such evidence." *Id*., at 232.

In the jurisdictions that Alderman could find cases analyzing the element of causation in a negligence claim against an insurance agent, the courts follow the "availability and eligibility" requirement for causation to exist. See *Hawk v. Roger Watts*

Ins. Agency, 989 So. 2d 584, (Ala. Civ. App. 2008) (affirming summary judgment on negligent procurement theory of liability because the plaintiff could not establish the requested insurance was available to him); *Sheehan v. Nw. Mut. Life Ins. Co.*, 44 S.W.3d 389, 395 (Mo. Ct. App. 2000), *opinion adopted and reinstated after retransfer* (June 11, 2001) (affirming summary judgment because there was no evidence that had the insured truthfully completed an application for life insurance, particularly his history of drug use, the insured (now deceased from drug use) would have received more or different insurance); *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 838 (Tex. 2009) (holding that the mere fact that some policy would cover the claim was insufficient and that the plaintiff must introduce evidence that the requested coverage would have covered the loss sustained to establish causation); *Heller-Mark & Co. v. Kassler & Co.*, 37 Colo. App. 267, 269, 544 P.2d 995, 997 (1976) (holding that "[i]t would be insufficient under these circumstances merely to allege loss of opportunity to seek insurance coverage where the attempt might not have been successful).

Contrary to Camper Corral's assertion, the court in *Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc.* contemplated both the availability and eligibility for the requested insurance. Although the court in *Tri-Town* declined to decide as a matter of law whether the availability of the requested coverage was required for negligent procurement causes of action, it cited favorably to cases where availability and eligibility were required. *Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc.*, 2007 ME 67, ¶ 9, 924 A.2d 1066, 1069-70.

The cases cited include *Johnson & Higgins of Alaska, Inc. v. Blomfield*, 907 P.2d 1371 (Alaska 1995), *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d 239 (Colo. 1987); *Am. Motorists Ins. Co. v. Salvatore*, 476 N.Y.S.2d 897, 900, 102 A.D.2d 342 (N.Y. App. Div. 1984) and *State v. Warren Star Theater*, 84 Ohio App. 3d 435, 616 N.E.2d 1192 (1992). In each of these cases, the plaintiff's eligibility for the requested coverage was material to the element of causation.

In *Johnson & Higgins of Alaska, Inc. v. Blomfield*, the court concluded that the plaintiff had established eligibility for alternative insurance through his expert who testified that "it was more probable than not that another carrier would have provided coverage without a contamination exclusion." 907 P.2d at 1374-75.

In *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, the court held that if the plaintiff showed commercial availability in the marketplace at the time of procurement, the burden shifted to the defendant to show that the coverage sought was not commercially available or that the plaintiff was uninsurable due to individualized factors. 739 P.2d at 244. Camper Corral argues that *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.* stands for the proposition that general or commercial availability is sufficient to establish causation and that the plaintiff need only prove commercial availability. Camper Corral is partially correct. It is true that the court in *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.* held the plaintiff bore the burden of establishing general or commercial availability. *Id.* However, whether the plaintiff was eligible for the general or commercial availability was material to the causation analysis and placed the burden on the defendant to establish ineligibility. *Id.* In

other words, mere commercial availability does not establish causation; the plaintiff-insurance customer's personal eligibility is an essential factor in the causation analysis.

In *American Motorists Insurance Company v. Salvatore*, the court held that an insured must demonstrate "that coverage could have been procured." 476 N.Y.S.2d 897, 900. The court held that because the insured could not prove that the coverage sought was obtainable from any other insurer, the insured failed to establish a triable issue of fact. *Id*.

In *State v. Warren*, the plaintiffs alleged that the insurance agent failed to procure officers and director's liability coverage. 616 N.E.2d at 441. The court held that the plaintiffs failed to establish the agent's negligent conduct caused their injury because "[t]here was no evidence presented that, had directors' and officers' liability coverage been in place, [] plaintiffs would have been protected by said policy." *Id*. Specifically, the plaintiffs failed to present "evidence that a claim presented to the insurance company under a directors' and officers' liability policy would have been deemed meritorious." *Id*.

Camper Corral references two other cases in a string cite in support of its argument that commercial or general availability is sufficient to establish causation. *Appellant's Br., p. 16*. Neither case stands for such a proposition. In *Kabban v. Mackin,* 104 Or. App. 422, 433, 801 P.2d 883, 890 (1990), the only issue raised by the defendant on appeal is whether the plaintiff had met the burden of showing general or commercial availability in the marketplace. In its analysis, the court cites to *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc. Id*., at 433-34. As discussed above, *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.* contemplates more than just general or commercial availability in the marketplace for purposes of causation.

The second case Camper Corral cites is a Florida case – *Morgan International Realty v. Dade Underwriters Insurance Agency*, 524 So. 2d 451 (Fla. App. 1988). However, the decision Camper Corral cited is the first of three appellate decisions in that case. In the final appellate decision, it becomes clear that Florida requires more than just general or commercial availability to establish causation in a negligent procurement case. *Morgan Int'l Realty v. Dade Underwriters Ins. Agency*, 617 So.2d 455 (Fla. App. 1993). In the third decision, the trial court had conducted a bench trial to which the parties stipulated. *Id*., 617 So.2d at 457. The trial court was tasked with determining whether a policy, which was allegedly available at the time of procurement, would have provided coverage for a malicious prosecution case that had been brought against the plaintiffs. *Id*. "If the court determined coverage existed, a jury would then decide whether the [insurance agent] acted negligently in failing to procure the policy. If the court determined that the policy did not provide coverage for malicious prosecution, that issue would be dispositive, mooting all other issues." *Id*. In other words, even if a policy was generally available in the marketplace, the policy must provide the requested coverage or the agent's negligence is irrelevant.

Camper Corral also cites to *Lazzara v. Howard A. Esser, Incorporated.* 802 F.2d 260, 266 (7th Cir. 1986) for the proposition that "[w]hether an insurer would have issued the policy 'is immaterial' if the broker failed to notify the applicant of the discrepancy." *Appellant's Br., p. 17.* The court in *Lazarra*, a federal court applying Illinois law, provides no citation to support its assertion that eligibility for coverage was immaterial. Instead, a few lines later it cites to an Illinois appellate court decision where the court looked at

whether the delay in submitting an application for insurance prevented the plaintiff-insured from seeking protection elsewhere. *Id*. *citing Talbot v. Country Life Ins. Co.*, 8 Ill. App. 3d 1062, 1065, 291 N.E.2d 830, 832. The federal court's leap from preventing a plaintiff-insured from seeking protection elsewhere to immateriality of the plaintiff-insured's eligibility for such insurance is unsupported by the cases it cites. Furthermore, under the case law cited, it stands to reason that if the plaintiff-insured had the opportunity to seek protection elsewhere, it necessarily follows that the plaintiff-insured must also be eligible for the alternative insurance in order to be protected.

The majority of jurisdictions require both availability of and eligibility for the requested insurance to establish the element of causation.

B. Comparable Wisconsin case law supports that causation requires availability of and eligibility for the requested coverage.

Camper Corral's assertion that Wisconsin courts do not require proof of alternative coverage in negligent procurement/negligent misrepresentation cases is not supported by the cases upon which Camper Corral relies. Specifically, neither case involves disputes as to whether the insured was eligible for the requested coverage. In *Appleton Chinese Food Service, Inc. v. Murken Insurance, Inc.*, 185 Wis. 2d 791, 798, 519 N.W.2d 674, 676 (Wis. Ct. App. 1994), the insured requested lost business income coverage but did not receive it due to a clerical error in the application process which did not include the coverage.. Similarly, in *Rainer v. Schulte*, 133 Wis. 130, 113 N.W. 396 (Wis. 1907), there is no assertion that the insureds were ineligible for the coverage requested. Instead, the purported agent was not an agent at all and never procured the policy. *Id*. Camper Corral's suggestion that because damages were awarded in these two negligent procurement cases, Wisconsin

courts do not require evidence of alternative coverage is a *non sequitur*. The existence of the element of damages does not predicate the existence of the element of causation in a negligence claim.

The closest Wisconsin case on point is the one cited by the court of appeals – *Wallace v. Metropolitan Life Insurance Company,* 212 Wis. 346, 248 N.W.2d 435, 436 (1933). As the court of appeals recognized, the *Melin* case aligns with the reasoning found in the *Wallace* case. In *Wallace*, the court noted that the damages sought are those related to the defendant insurance company's conduct of "fail[ing] to act upon the application [for life insurance] with diligence." The court then held that there was no showing that the defendant's failure to act with diligence caused the plaintiff's damage. *Id*. In reaching its holding, the court reasoned that there was no evidence that the decedent-insured could have procured "other insurance of the same kind and character". *Id*. In its discussion regarding the ability to procure other insurance, the court noted the decedent-insured's recently discovered heart condition and his death within sixty days of the application. *Id*.

Camper Corral's assertion that *Wallace* "arguably" stands for the proposition that general availability is sufficient ignores the court's discussion of individualized characteristics of the applicant. *Appellant's Br., p. 19.* The *Wallace* court's reasoning reflects the reality of insurance. An insurance contract requires two parties: an insured, and an insurance company that will enter into the contract with that particular insured. Capmer Corral's attempt to distinguish casualty insurance from the types of insurance in *Wallace* and *Melin* (*Appellant's Br., pp. 19-20)* is of no consequence.

The *Wallace* court's reasoning aligns with the reasoning in *Melin* and every other case analyzing the element of causation involving negligence of an insurance agent that has been cited in this matter to date – that causation requires both availability of and eligibility for the requested coverage. The differences in the jurisdictions lie not with the requirements to establish causation (availability and eligibility) but rather who bears the burden on the issue of causation.

Regardless of who bears the burden, the consensus amongst jurisdictions is that there must be evidence of both availability in the marketplace and the plaintiff's eligibility for the coverage. The trial record is clear that Camper Corral could not have procured a policy with a $1,000 per unit deductible/$5,000 aggregate because Camper Corral did not qualify for such coverage. The May 2011 hail claim and the summer 2012 hail claim rendered Camper Corral a high-risk insured. Camper Corral's claim history made it unsuitable for the insurance Camper Corral desired during the policy period of September 30, 2013 and September 30, 2014. Camper Corral's own expert conceded that Camper Corral would not have been able to procure the requested coverage during the 2013-2014 policy period. He was asked, "[s]o during the September 30, 2013 to September 30, 2014, policy, now that you have been provided with the amount of the two previous claims, do you think it's possible to get a policy with a $1,000/$5,000 aggregate deductible for wind and hail." (Record No. 108, 137:11-16.) He answered, "No." (*Id.*, at 137:17.)

The circuit court properly concluded that the element of causation was unsupported by the evidence admitted a trial and properly granted a directed verdict. The court of appeals properly affirmed the circuit court. This Court should also affirm.

C. As a matter of public policy, causation requires availability of and eligibility for the requested coverage.

> As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequence of any act, upon the basis of some social idea of justice or policy.

Prosser, Law of Torts, p. 236-37 (4th ed. 1971). In other words, society does not wish to impose liability for results which would have occurred notwithstanding negligent conduct such as an insurance agent's negligence in procuring insurance requested or misrepresenting the insurance procured. It is fundamental to American jurisprudence that civil litigation redress wrongs that cause damage. Camper Coral's cause of action seeks compensatory damages, not punitive damages.

D. The measure of damages does not predicate the element of causation in a negligence claim.

Camper Corral discusses the measure of damages at varying points in its brief, presumably to suggest that the measure of damages drives the evidence necessary to establish causation. Camper Corral erroneously conflates the element of causation and the element of damages. The issue of damages will be address in *Section III* below.

E. *Runia v. Marguth Agency, Inc.* is not applicable because the record is void of any evidence that Camper Corral would have acted differently.

While it may be true that the Minnesota Supreme Court distinguished *Runia v. Marguth Agency, Incorporated*, 437 N.W.2d 45, 49 (Minn. 1989), from its decision in *Melin*, the distinction is not helpful to Camper Corral. In *Runia*, the Minnesota Supreme Court concluded that because the insured "could, and *testified* he would, have refused to" engage in the uninsured conduct (loaning his snowmobile to his daughter who was not

covered under the policy), the agent's negligent misrepresentation was a cause of the plaintiff's damages. (emphasis added). In other words, there was evidence in the trial record.

The unpublished opinion from Hawaii's Intermediate Court of Appeals is also not helpful to Camper Corral. *Certain Underwriters at Lloyd's London Subscribing t oPolicy No. LL001HI0300520 v. Vreeken*, No. 30156, 2014 WL 2949463 (Haw. App. Jun. 30, 2014) [1]. In *Vreeken*, the court affirmed the trial court's denial of the defendant-agent's motion for judgment not withstanding the verdict. 2014 WL 2949463, *5-6. The court reasoned that an agent's negligence could be a substantial factor in causing a plaintiff's damages even if alternative coverage was not available. *Id*., at *5. In a footnote associated with its reasoning, the court discussed plaintiff's trial testimony that he would not have continued the renovations to his home until the insurance that had lapsed was reinstated. *Id*., at fn. 3. In other words, the trial record established that the plaintiff would have avoided or discontinued the uninsured conduct.

Similarly, the court in *Tri-Town Marine* looked at whether the plaintiff showed it would have acted differently absent the agent's negligent conduct. 924 A.2d at 1070. The appellate court affirmed the grant of summary judgment because the plaintiff "never

[1] *Certain Underwriters at Lloyd's London Subscribing to Policy No. LL001HI0300520 v. Vreeken*, No. 30156, 2014 WL 2949463 (Haw. App. Jun. 30, 2014) is an unpublished decision and is not even precedential in Hawaii. See Hawaii's Rules of Civil Procedure 35(2) ("unpublished dispositional orders are not precedent"). Furthermore, "a copy of a cited unpublished disposition shall be appended to the brief…in which the unpublished disposition is cited."

alleged or demonstrated that, had it known the true scope of the policy at the time, it would have acted any differently in procuring the coverage." *Id.*

Unlike the plaintiffs in *Runia*, *Vreeken*, and *Tri-Town Marine*, there is no evidence in the trial record that Camper Corral would have done anything differently. While Camper Corral suggests it "*could have* reduced or eliminated [] on-site inventory…[or]…stored [] units under cover…[or]…made different delivery arrangements with [its] supplier," none of this is in the trial record. *Appellant's Br., p. 20* (emphasis added). Camper Corral's "could haves" are irrelevant now that the trial record is closed. For the reasoning in *Runia* and *Vreeken* to apply here, Camper Corral must point to evidence in the trial record that shows it would have done any of the proffered "could haves."

Camper Corral cannot. In fact, the evidence admitted at trial indicates the opposite is true. Specifically, Camper Corral began using a "floorplan" loan in 2012 which it continued during the 2012-2013 policy – a policy that had a $5,000 per unit deductible. Notably, during the course of the 2012-2013 policy period, Camper Corral obtained a larger "floorplan" loan than the preceding year. (Record No. 107, 138:13-15.) In other words, despite knowing there was a $5,000 deductible on every unit in its inventory, Camper Corral increased its inventory from previous years when it had much more favorable coverage (a $500 per unit deductible). Additionally, Ms. Emer testified she was continuing to grow Camper Corral's business, even during the time that she was covered by the high deductible policy. (Record No. 108, 32:13-24) Furthermore, Camper Corral was required to have the garage policy in order to stay in business. (Record No. 107, 133:3-17.)

The trial record does not contain any evidence that Camper Corral would have done anything differently if it knew the deductible remained at $5,000 per unit for the 2013-2014 policy year. Therefore, Camper Corral had insufficient evidence to support the causation element and the circuit court's directed verdict was correct. This Court should affirm the decisions by the circuit court and the court of appeals.

IV. WISCONSIN CASE LAW SUPPORTS PLAINTIFF BEARING THE BURDEN TO PROVE AVAILABILITY AND ELIGIBILITY FOR THE REQUESTED COVERAGE

Although not necessarily an issue raised in Camper Corral's petition for review, the issue of burden of proof on availability of and eligibility for coverage necessarily go hand-in-hand with the issue before this Court. *In Interest of Jamie L.*, 172 Wis. 2d 218, 232, 493 N.W.2d 56, 62 (1992) (holding that "[o]nce a case comes before this court, we have discretion to review 'any substantial and compelling issue' the case presents).

Courts are split on which party bears the burden of proof in a negligence claim against an insurance agent. A majority of the jurisdictions reviewed by Alderman place the burden on the plaintiff to establish not only that the requested coverage is available but also that the plaintiff would have been eligible for the requested coverage. One jurisdiction utilizes a burden-shifting approach where a defendant must establish that the plaintiff was ineligible for the requested coverage once the plaintiff establishes the coverage was available in the marketplace. The remaining jurisdictions consider it an affirmative defense for the defendant to establish that either the requested coverage was not available and/or that the plaintiff was ineligible for the requested coverage.

The following jurisdictions place the burden on the plaintiff to establish both availability and eligibility: Texas (*Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d at 838 (Tex. 2009)); Ohio (*State v. Warren Star Theatre*, 84 Ohio App. 3d at 441); New York (*MacDonald v. Carpenter & Pelton, Inc.*, 31 A.D.2d 952, 953, 298 N.Y.S.2d 780 (1969)); Washington (*Pacific Dredging Co. v. Hurley*, 65 Wash. 2d 397, 397 P.2d 819 (1964)); Massachusetts (*Rayden Eng'g Corp. v. Church*, 337 Mass. 652, 662, 151 N.E.2d 57, 64 (1958)); Kansas (*Smith v. United Benefit Life Ins. Co.*, 164 Kan 447, 456 190 P.2d 183, 189 (1948)); Montana (*Weaver v. W. Coast Life Ins. Co.*, 99 Mont. 296, 42 P.2d 729, 733 (1935) (negligent delay in acting on application by insurance company); Minnesota (*Backus v. Ames*, 79 Minn. 145, 148, 81 N.W. 766, 766 (1900)).

The following jurisdiction utilizes a burden-shifting methodology: Colorado (*Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d at 244).

The following jurisdictions view the availability and eligibility issue as an affirmative defense: Maryland (*United Capital Ins. Co. v. Kapiloff*, 155 F.3d 488 (4th Cir, 1998) (citing *Patterson Agency, Inc. v. Turner*, 35 Md. App. 651, 372 A.2d 258 (1977)); Missouri (*Hans Coiffures Int'l, Inc. v. Hejna*, 469 S.W.2d 38, 40 (Mo. App. 1971)).

In the majority of the jurisdictions reviewed by Alderman, it is the plaintiff's burden to present evidence of both availability and eligibility which follows Wisconsin's burden of proof framework.

> A plaintiff in a negligence action carries a twofold burden of proving causation. First, the plaintiff has the burden of producing evidence, satisfactory to the judge, from which a jury could reasonably find a causal nexus between the negligent act and the resulting injury. If the plaintiff fails to meet this burden, the plaintiff has failed to establish a prima facie issue

> of causation and the defendant is entitled to a directed verdict. Second, if the plaintiff meets the burden of production and the causation question is submitted to the jury, the plaintiff has the burden of persuading the jury that the negligence in fact caused the injuries.

Fischer by Fischer v. Ganju, 168 Wis. 2d 834, 857, 485 N.W.2d 10, 19 (1992). In *State v. McFarren*, 62 Wis. 2d 492, 499-500, 215 N.W.2d 459, 463-64 (1974), this Court discussed the five factors for determining who bears the burden of proof. This Court quoted from McCormick, Evidence (2d ed.) as follows:

> The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure or proof or persuasion. The rules which assign certain facts material to the enforcibility (sic) of a claim to the defendant owe their development partly to traditional happen-so and partly to considerations of policy.

Id., 62 Wis. 2d at 499, 215 N.W.2d at 463. After analyzing the remaining factors, this Court stated that "the burden of proof should be on that party desiring the change except where it may be easier for the other party to prove the fact in question." *Id*., 62 Wis. 2d at 504, 215 N.W.2d at 466.

Under Wisconsin's "substantial factor" test, "[t]he phrase 'substantial factor' denotes that the defendant's conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense." *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 458–59, 267 N.W.2d 652, 654 (1978). In legal malpractice claims, the plaintiff-client bears the burden of proof on causation. *Lewandowski v. Cont'l Cas. Co.*, 88 Wis. 2d 271, 277, 276 N.W.2d 284, 287 (1979).

Camper Corral, as the plaintiff, must introduce evidence sufficient to establish a causal connection between the negligent act and the resulting injury. Camper Corral claims it would be difficult for a plaintiff to prove more than "general availability"; however, the court of appeals identify at least two ways – expert testimony or quote sheets from a different insurer for the 2013-14 policy year with the $1000 deductible/$5000 aggregate. (A-26, at Fn. 6.) Just as the insured-plaintiff, an insurance agent would have to seek out expert testimony to establish that the insured-plaintiff was not qualified for the requested insurance. Furthermore, the possession of quote sheets from competitors are more likely to be in the possession of the insured-plaintiff than an insurance agent. Following *State v. McFarren's* reasoning, the burden of proof on causation in cases involving negligent procurement/negligent misrepresentation by an insurance agent should be on the insurance clients-plaintiffs because they desire the change and the ability to prove the fact in question is easier for them than for the insurance agent.

A plaintiff in a negligent procurement and/or negligent misrepresentation claim against an insurance agent should bear the burden of producing evidence as to both availability of and eligibility for the requested coverage.

V. THE MEASURE OF DAMAGES FOR NEGLIGENCE IN INSURANCE AGENT CASES IS DEFINED BY THE COVERAGE AN INSURED WOULD HAVE HAD ABSENT THE INSURANCE AGENT'S NEGLIGENCE

Camper Corral appears to argue that the measure of damages in negligent procurement or negligent misrepresentation cases somehow establishes the element of causation. As noted above, damages are a separate and distinct element of a cause of action premised on negligence. Notwithstanding Camper Corral's flawed reasoning, the proper

measure of damages is the coverage the tortfeasor would have had but for an insurance agent's negligence.

The "out-of-pocket" rule is an imprecise measure of damages in this case and Camper Corral cites to no Wisconsin case law which supports its application in cases other than the sale or exchange of property. This is underscored by the very jury instruction which sets forth the "out-of-pocket" rule. Wisconsin Jury Instruction 2406 is entitled "Negligent Misrepresentation: Measure of Damages in Actions Involving Sale [Exchange] of Property (Out of Pocket Rule)". *See* WIS JI-CIVIL 2406.

"[T]he measure of damages is the difference, if any, between the market value of the property at the time of purchase and the amount of money that (plaintiff) paid for the property." WIS JI-CIVIL 2406. Even assuming the "out-of-pocket" rule applied, then the damages Camper Corral would be entitled to would be the difference between the market value of the policy Camper Corral purchased for the 2013-2014 policy period and the amount it paid for the policy, if any.

Similarly, the "benefit-of-the-bargain" rule is an imprecise measure of damages in matters other than real estate transactions. *See* WI JI-CIVIL 2405.5 (entitled "Strict Responsibility: Measure of Damages in Actions Involving Sale [Exchange] or Property (Benefit of the Bargain)"). Camper Corral cites *Lazzara v. Howard A. Esser, Incorporated* for the proposition that the "benefit-of-the-bargain" rule was applied in a negligent procurement case. *Appellant's Br., p. 17*. *Lazarra* does not frame it as the "benefit-of-the-bargain" rule but rather states the damages just as Alderman proposes – that damages are determined by the policy the agent failed to get. 802 F.2d at 266. Alderman agrees with the

Lazzara decision for this limited purpose. Alderman's disagreement with the remainder of *Lazzara* is set out above and will not be revisited here.

Alderman appreciates that the "benefit-of-the-bargain" rule was applied in *Schurmann v. Neau*, 2001 WI App 4, ¶ 5, 240 Wis. 2d 719, 724, 624 N.W.2d 157, which arose in the context of an insurance procurement situation. However, the plaintiff-insured's claims against the agent were strict responsibility and intentional misrepresentation.. Here, the only pled claim is one of negligence; therefore, the case is not persuasive.

Furthermore, the facts in *Schurmann* are significantly different than this case. In *Schurmann*, the insured paid the first premium for a policy which provided for a $4,000 per month disability payment coverage in the event of disability and the policy was in fact issued with a $4,000 per monthly disability payment coverage. 2001 WI App 4, ¶ 2, 240 Wis. 2d 719, 722-23, 624 N.W.2d 157. After receiving disability payments of $4,000 for several months, the insurance company stopped payments on the basis that the plaintiff's past income did not support a $4,000/month payment and payments must be reduced by other benefits (e.g. social security). *Id.*, at ¶ 3. Furthermore, the issue was whether the plaintiff "was denied the benefit of the bargain in regard to the" policy he purchased. *Id*. at ¶ 16. In other words, it was whether the insured received the benefit of the contracted-for policy (i.e. the difference between the $4,000 disability payment set forth in the policy and amounts actually received).

Unlike the insured in *Schurmann*, Camper Corral did not pay for a policy with a $1,000 per unit deductible/$5,000 aggregate cap. Nor does Camper Corral establish that it was improperly compensated by the insurance company (Western Heritage) in accordance

with the policy that was in place ($5000 per unit deductible). Thus, *Schurmann* is not persuasive and does support the application of the "benefit-of-the-bargain" rule here because Camper Corral received the benefit of the bargain in regard to the Western Heritage policy.

The "benefit-of-the-bargain" rule and "out-of-pocket" rule are not the appropriate measure of damages in cases involving negligent procurement of insurance or misrepresentation by an insurance agent. The appropriate damages, assuming the plaintiff establishes causation, should be defined by the terms of the policy the agent failed to procure or misrepresented.

VI. CAMPER CORRAL'S ARGUMENT REGARDING BREACH OF CONTRACT OR STRICT MISREPRESENTATION IS IMPROPER BECAUSE ITS PETITION FOR REVIEW WAS LIMITED TO THE SINGLE ISSUE OF CAUSATION IN A NEGLIGENCE CAUSE OF ACTION

A. Camper Corral's argument regarding breach of contract and strict misrepresentation is improper because it did not identify it as an issue in its petition for review.

"If a petition is granted, the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court." Wis. Stat. § 809.62(6).

The only issue identified by Camper Corral in its petition for review was "what a plaintiff must prove in order to show causal damages in a suit against an insurance agent for failure to procure casualty insurance." *Petition for Review, p. 7.* The sole focus of Camper Corral's petition is whether commercial availability is sufficient or whether the plaintiff must have been eligible for the commercially available coverage requested. The only reference to the court of appeals' refusal to consider alternative causes of action to conform to the evidence is in a footnote (*Petition for Review, fn. 6*). Furthermore, there is

no argument or analysis in the footnote, only a string cite regarding the elements and measure of damages of breach of contract and strict misrepresentation.

This Court should not consider Camper Corral's argument regarding breach of contract and strict misrepresentation because the issue was not properly preserved in the petition for review.

B. Alternatively, Camper Corral waived its argument to amend the Complaint, amending the Complaint would be prejudicial to Alderman, and the trial record has insufficient evidence to support unpled causes of action.

1. *Camper Corral forfeited its argument that the Complaint should be amended to conform to the evidence because it did not raise such arguments in the circuit court.*

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court…generally will not be considered on appeal." *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 15, 273 Wis. 2d 76, 89–90, 681 N.W.2d 190, 196 quoting *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d. 486, 611 N.W.2d 727.

> The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal.... It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection.... Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials.... Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.... For all these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

State, 2000 WI at ¶ 12.

An appellate court may address forfeited issues in exceptional cases such as "when the issue 'involves a question of law rather than of fact, when the question of law has been briefed by both parties and when the question of law is of sufficient public interest to merit a decision [.]'" *Vill. Of Trempealeau v. Mikrut*, 2004 WI at ¶ 17 quoting *Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998).

Camper Corral seems to argue that because the circuit court considered materials outside of the trial record, Alderman's motion for directed verdict became a motion for summary judgment which opens the door for this Court to consider facts outside of the trial record. *Appellant's Br., pp. 21-22*. Camper Corral cites to a single sentence in the circuit court's oral statements to the jury regarding its decision to grant the motion for directed verdict. The statements made to the jury were simply to inform, not a part of the court's decision. In its oral decision, the circuit court clearly confines its decision regarding insufficient evidence on causation to testimony and exhibits. (Record No. 108, 146:1-19.)

Furthermore, the court's reference to the transcript and other documents refers to the transcript of Camper Corral's expert which was read into the record and the documents entered as evidence in the trial. The mere fact that Alderman referred to prior summary judgment materials does not establish the court considered the materials in its decision, particularly when both the oral and written decisions focus almost exclusively on Camper Corral's own expert's testimony that Camper Corral would not have been eligible for a policy with a $1,000 per unit deductible/$5,000 aggregate.

Camper Corral forfeited any argument that there were potential causes of action premised on breach of contract or strict misrepresentation because it did not seek to amend its Complaint at any point in the circuit court.

2. Amending the Complaint is improper because it prejudices Alderman and Alderman did not consent to trying unpled causes of action.

An amendment to pleadings may not prejudice the objecting party. *Autumn Grove Joint Venture v. Rachlin*, 138 Wis. 2d 273, 278, 405 N.W.2d 759, 761 (Wis. Ct. App. 1987). A defendant is prejudiced when the new theories of liability require proof different than the theory alleged in the complaint. *Id*., 405 N.W.2d at 762. Shifting the theories of liability in the midst of trial imposes unfair surprise and prejudices the defendant's defense of the case. *Id*.

On the other hand, a party may consent, expressly or impliedly, to trying unpled causes of action. Express consent may be given via stipulation or when incorporated in a pre-trial order. *Hess v. Fernandez*, 2005 WI 19, ¶ 19, 278 Wis. 2d 283, 298, 692 N.W.2d 655, 663. "[I]mplied consent exists where there is no objection to the introduction of evidence on the unpleaded issue and where the party not objecting is aware that the evidence goes to the unpleaded issue." *Id*. at ¶ 21. In other words, "actual notice to the parties is the key factor in determining if there was implied consent." *Id*. Furthermore, whether a case was tried by implied consent should be made by the circuit court. *Id*. at ¶ 20.

Fraud must be plead with particularity. Wis. Stat. § 802.03(2). "Fraud is a generic and an ambiguous term. It embraces misrepresentation which may be separated into the

three familiar tort classifications of intent, negligence, and strict responsibility." *Whipp v. Iverson*, 43 Wis.2d 166, 169, 168 N.W.2d 201 (1969).

Shifting theories of liability following the close of evidence at trial prejudices Alderman in his defense of the case, therefore, amending the Complaint to conform to the evidence is improper.

Alderman did not consent, impliedly or otherwise, to trying strict misrepresentation or contract causes of action simply by referencing negligent misrepresentation in its motion for directed verdict. The record contains no evidence that Alderman consented to litigate these unpled claims.

Finally, the circuit court did not determine whether Alderman impliedly consented to trying unpled causes of action because Camper Corral did not move to amend its Complaint at the circuit court level. Nor, when faced with a motion for directed verdict during trial, did Camper Corral raise the argument that other possible causes of action were supported by sufficient evidence in the record and those matters should go to the jury.

Amending the Complaint at this stage of the case is improper and Camper Corral should be confined to the cause of action pled in its Complaint.

3. The evidence does not support amending the Complaint to include breach of contract or misrepresentation.

Where the evidence in the record does not establish a cause of action, the court shall not permit amendment of a complaint to conform to the evidence. *Bailey v. Bailey*, 135 Wis. 560, 116 N.W. 178, 179 (1908). While it is not clear what standard a court should apply in the context of a directed verdict, the summary judgment standard seems most appropriate since a directed verdict is premised on insufficiency of evidence. In a motion

for summary judgment, the nonmoving "party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3).

Camper Corral's brief fails to meet its burden even under a summary judgment standard because it rests upon the allegations in its pleadings. Camper Corral simply states that the Complaint contains allegations which "give rise to at least four separate theories of recovery" (*Appellant's Br., p. 23*.) Camper Corral's brief does not identify what evidence supported either a breach of contract or a strict misrepresentation cause of action going to the jury. It is important to remember that Camper Corral had already rested its case when Alderman made the motion for directed verdict. Therefore, Camper Corral is confined to the evidence introduced.

Camper Corral fails to meet its burden in opposing a pseudo-motion for summary judgment.

i. Camper Corral did not introduce evidence sufficient for a strict misrepresentation cause of action.

The elements of strict misrepresentation are (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant made the representation based on his or her personal knowledge, or was so situated that he or she necessarily ought to have known the truth or untruth of the statement; (4) the defendant had an economic interest in the transaction; and (5) the plaintiff believed that the representation was true and relied on it to its detriment. *Malzewski v. Rapkin*, 2006 WI App 183, ¶ 19, 296 Wis. 2d 98, 112, 723 N.W.2d 156, 163.

A plaintiff must establish detrimental reliance to succeed on claims of intentional, negligent and strict liability misrepresentation. *Ollerman v. O'Rourke Co., Inc.*, 94 Wis.2d 17, 25, 288 N.W.2d 95 (1980). Misrepresentation actions cannot be based on future events or facts not in existence when the representation was made. *Hartwig v. Bitter*, 29 Wis. 2d 653, 658, 139 N.W.2d 644, 647 (1966). However, if at the time of the assertion, "the speaker knew of facts inconsistent with his statements or had a present intent not to perform", a misrepresentation action may be maintained. *Id*.

Camper Corral cites to no evidence in the record establishing reliance to its detriment. Camper Corral did not pay a premium for a policy with a $1,000 per unit deductible/$5,000 aggregate cap and then only receive a policy for a $5,000 deductible. In other words, Camper Corral received what it paid for – a policy of insurance with a $5,000 per unit deductible.

To the extent that Camper Corral may argue its detriment was opting not to shop for a better deal, such arguments have been dismissed in the absence of evidence that a better deal was available to Camper Corral. See *Randall v. PNC Capital Markets LLC*, 2015 WI App 37, ¶ 14, 363 Wis. 2d 655, 862 N.W.2d 903 (unpublished). Furthermore, the evidence is clear that no insurer would have provided Camper Corral insurance with a $1,000 per unit deductible/$5,000 aggregate cap coverage during the 2013-2014 policy period due to its recent claims history.

The strict misrepresentation also fails because there is no evidence of Alderman's financial interest in making a representation of a $1,000 per unit deductible/$5,000 aggregate cap. While it may be true that Alderman received a commission, this would be

true regardless of which policy Camper Corral purchased. Unlike in a real estate transaction where a misrepresentation may induce a transaction that would not otherwise occur, Camper Corral was purchasing an insurance policy irrespective of any purported erroneous representations because Camper Corral was required to have insurance by its floorplan financier and to stay in business. In other words, Alderman would have received a commission notwithstanding any purported misrepresentations.

There is no evidence that Alderman was financially motivated to misrepresent the size of the deductible. Indeed, there is no evidence available outside the trial record because it is inherently implausible. Camper Corral could not get a $1,000 per unit deductible/$5,000 aggregate cap. There was no rational or plausible financial motive for Alderman to misrepresent the deductible. A strict misrepresentation theory presents an utterly irrational scenario.

Because the evidence introduced at trial does not support strict misrepresentation, amendment is improper.

> *ii. Camper Corral did not introduce evidence sufficient to establish a contract existed which is a predicate for a breach of contract cause of action.*

Before a breach of contract cause of action to be maintained, there must be evidence of an actual contract. To establish the existence of a contract, Camper Corral must establish offer, acceptance and consideration. *In re F.T.R.*, 2013 WI 66, ¶ 57, 349 Wis. 2d 84, 115, 833 N.W.2d 634, 649. Camper Corral did not introduce sufficient evidence to establish the existence of a contract a trial. Specifically, there is insufficient evidence of consideration.

The evidence in the record does not support the existence of a contract. Therefore, the Complaint may not be amended.

CONCLUSION

This Court should affirm the circuit court's directed verdict and the court of appeals' affirmance because there is insufficient evidence in the trial record establishing that any purported negligence by Defendants-Respondents' Michael A. Alderman and Alderman, Inc. d/b/a Jensen-Sundquist Insurance Agency was the cause of Petitioner-Plaintiff Emer's Camper Corral's damages.

Respectfully submitted,

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CERTIFICATION
As to Form and Length

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), as modified by the Court's order, and that the text is:

Times Roman proportional font, printed at a resolution of 300 dots per inch, 13-point body text, and 11-point text for quotes and footnotes, with a minimum leading of 1 point and a maximum of 60 characters per line.

The Argument and Conclusion sections of this brief contain 7,357 words.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §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.

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CERTIFICATION
As to Compliance with Rule 809.19(2)(b)

I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §80919(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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TOMSCHE, SONNESYN, & TOMSCHE, P.A.

Dated: August 30, 2019

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STATE OF WISCONSIN

I N S U P R E M E C O U R T

Appeal No. 18 AP 458

EMER'S CAMPER CORRAL, LLC,

Plaintiff-Appellant-Petitioner,

v.

MICHAEL A. ALDERMAN, ALDERMAN, INC.
d/b/a JENSEN-SUNDQUIST INSURANCE AGENCY AND WESTERN HERITAGE INSURANCE COMPANY,

Defendants-Respondents.

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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On appeal from the Circuit Court
of Burnett County, Hon. Melissia R. Mogen,
Circuit Judge, presiding; and the Court of Appeals, Dist. III.

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ARGUMENT

I. WISCONSIN LAW DOES NOT REQUIRE EMER TO PROVE CAUSATION BY SHOWING SHE COULD HAVE OBTAINED THE SAME OR BETTER POLICY FROM ANOTHER SOURCE.

1. The majority of appellate decisions require proof of general commercial availability.

According to Alderman, *Melin v. Johnson*, 387 N.W.2d 230 (Minn. Ct. App. 1986) reflects "the consensus among the jurisdictions[.]" Emer must prove two things: 1) "coverage was available in the marketplace"; and, 2) "the plaintiff/insured was eligible for the coverage purportedly requested…." Emer meets the

eligibility requirement by showing she "could have procured a policy insuring hail and windstorm from September 30, 2013 to September 30, 2014, which would have been in effect on the date of loss on September 3, 2014 with a $1,000 deductible and a $5,000 maximum deductible." (108:128-129). Alderman cites *Hawk v. Roger Watts Ins. Agency*, 989 So. 2d 584, (Ala. Civ. App. 2008); *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 838 (Tex. 2009); *Sheehan v. Nw. Mut. Life Ins. Co.*, 44 S.W.3d 389, 395 (Mo. Ct. App. 2000); and, *Heller-Mark & Co. v. Kassler & Co.*, 544 P.2d 995, 997 (Colo. 1976) as evidence of this "consensus." (Alderman's Brief, p. 9-11).

Alderman is wrong. Neither *Hawk* nor *Metro Allied Ins. Agency, Inc.*, support this alleged "consensus" because they were decided solely on availability grounds. In *Hawk*, "the record does not demonstrate that the coverage Hawk wanted in the event of a total loss of his vehicle was actually available from any insurance provider." *Hawk.*, at 591. In *Metro*, the plaintiff "produced…no CGL insurance agreement available in the market that would have provided coverage for the claims against him;…." *Metro*, at 836. In fact, *Metro* affirmatively suggests there is no "eligibility" requirement when it states: "There must be proof of ***an*** *insurance policy* that would cover the alleged injury." (emphasis added). *Metro*, at 836. *Metro* also cites *Stinson v. Cravens, Dargan & Co.*, 579 S.W.2d 298, 299 (Tex. Civ. App 1979) for the proposition that a plaintiff need only prove "'that the loss is one insured against *in some policy*'" (emphasis added). *Id.*

In *Sheehan*, life insurance benefits were denied because the decedent committed fraud when he lied on the questionnaire about his drug use. *Id*., at 395. Decedent's insurability was discussed solely in the context of an alternative claim alleging the agent was negligent for "not attempting to find other insurance." The court denied the claim finding there was no proof decedent would have received more *or different* insurance" had *the agent* been "provided a truthful and complete application[.]" (emphasis added). *Id.* Not only was this alternative claim moot, it was limited to whether this particular "agent" could have obtained another policy.

Only *Heller Mark & Co.* squarely holds that a plaintiff must show he or she could have procured alternate insurance. *Id.*, at 997. In a subsequent case decided by the same court, however, *Heller* was cited as authority but effectively overruled with a much more nuanced legal standard. See *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d 239, 244 (Colo. 1987).

First, the plaintiff meets a *prima facie* burden by showing:

> …*that such insurance was generally available in the insurance industry* when the broker or agent obtained insurance coverage for the plaintiff. A plaintiff is not required to show that the particular insurance company from which the servicing broker or agent procured the plaintiff's policy would have written such coverage or that the servicing broker or agent could have obtained such coverage from a specific company. On the contrary, consistent with *Heller-Mark* [citation omitted*], we hold that a plaintiff satisfies his burden of proof when he establishes that the type of insurance which he sought was generally available in the insurance industry when the broker or agent procured the plaintiff's insurance policy.*

(emphasis added). *Bayly*, at 244. Second, once the plaintiff makes this "*prima facie*" case, the:

> …burden of going forward with contrary evidence devolves on the defendant. [cite omitted]. …the defendant may present evidence that the type of insurance sought by the plaintiff was not generally available in the insurance industry when the broker or agent procured the plaintiff's insurance policy, or that, even if this type of insurance was generally available, the plaintiff nonetheless was uninsurable due to the high risk of loss associated with the plaintiff's activity or operation, or was uninsurable due to other reasons particular to the plaintiff or to the plaintiff's activity or operation. *With the case in this posture, 'the whole case is then thrown open to be decided as a fact, upon all the evidence.'* [citation omitted]

(emphasis added). *Id*.

Emer would have been entitled to a jury verdict under *Bayly*. She met her *prima facie* burden by showing general commercial

availability. Emer had previously obtained policies with a $500 deductible and was offered policies with a $1,000 deductible just prior to the 2014 hailstorm. (107:102, 110-111, 165-166). Having met her burden of production, *Bayly* would have submitted the causation question to the jury. *Bayly*, at 244; see also *Zak v. Zifferblatt*, 2006 WI App 79, ¶10, 292 Wis. 2d 502, 715 N.W.2d 739 (plaintiff entitled to jury verdict once burden of production met).

Alternatively, Alderman did not show "as a matter of law" that Emer "was uninsurable due to other reasons particular to the plaintiff[.]" *Bayly*, at 244. A motion for a directed verdict under Wis. Stat. § 805.14(3) challenges the sufficiency of the evidence and may only be granted when the court "'finds, as a matter of law, that no jury could disagree on the proper facts or inferences to be drawn therefrom,' and that there is no credible evidence to support a verdict for the plaintiff." (citation omitted). *Mueller v. Harry Kaufmann Motorcars, Inc.*, 2015 WI App 8, ¶16, 359 Wis. 2d 597, 859 N.W.2d 451. Although the same standard is applied on review, the trial court is better positioned to assess the evidence and therefore given substantial deference. *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 109-10, 362 N.W.2d 118 (1985). A directed verdict will not be overturned unless the trial court is "clearly wrong." A trial court is "clearly wrong" when it grants a directed verdict despite "any credible evidence" to support the claim. *Mueller*, at ¶16.

Causation is frequently an inference drawn by the trier of fact from the circumstances of the case. *Merco Distrib. Corp. v. Commercial Police Alarm Co., Inc.*, 84 Wis. 2d 455, 459, 267 N.W.2d 652 (1978). A reasonable inference which supports a plaintiff's claim is enough to defeat a directed verdict. See e.g. *Holloway v. K-Mart Corp.*, 113 Wis. 2d 143, 334 N.W.2d 570 (Wis. Ct. App. 1983) (employer was not entitled to a directed verdict on an employee's claim of defamation because the jury could have inferred that the employer publicized that the employee was fired for stealing).

Emer was not uninsurable. She had a policy in place that covered her inventory. Alderman's evidence on the deductible also had two important caveats. First, Alderman's experts did not rule out

the possibility of Emer obtaining a $1,000 per unit deductible if high enough premiums were paid. (32:2-3; 108:129). Likewise, when asked if Emer could have gone back into the "standard markets" more quickly than waiting a year without a claim, Emer's expert agreed it was possible: "It's based on relationships, how much volume we have as a company, you know. If you go back ten years prior, you look at loss information, and you work with the underwriter. It's always different." (108:142, 144). Second, Alderman's experts did not address whether Emer could have obtained a deductible *between* $1,000 and $5,000 per unit. (32:2-3; 33:2-3; 67:4; 68:3; 108:137). Any policy with a deductible of less than $5,000 would have produced damages.

Alderman's attempt to distinguish the other cases Emer cites is likewise unsuccessful. Alderman concedes that *Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc.*, 924 A.2d 1066, ¶ 10 (Me. 2007) refused to decide whether a plaintiff was required to show he or she could have obtained better coverage. The issue was effectively moot, in any event, as the plaintiff admittedly sought coverage which did not exist in the commercial marketplace. *Id*., at ¶8. Alderman attempts to qualify *Tri-Town*'s holding by claiming it "favorably" cites cases where availability and eligibility were both required. (Alderman's Brief, p. 11-12). Alderman is wrong. The cases *Tri-Town* cites do not support an eligibility requirement.

One of the cases cited is *Johnson & Higgins of Alaska, Inc. v. Blomfield*, 907 P.2d 1371 (Alaska 1995). According to *Johnson*, the "majority rule" requires a plaintiff to show that "coverage was commercially available for the loss sustained…" *Id*., at 1374. Neither party argued the plaintiff had to prove "eligibility." The only contested issue was the burden of proof. The court did not have to decide this issue because even if the plaintiff had the burden of proof, his evidence at trial was more than enough to show "commercial availability." *Id. Am. Motorists Ins. Co. v. Salvatore*, 102 A.D.2d 342, 346, 476 N.Y.S.2d 897, 900 (N.Y. App. Div. 1984) was also decided on availability grounds. "Eligibility" was not argued or discussed. Coverage was unavailable because it was not offered by any "insurance company writing automobile policies in the State of New

York....” *Id.* Likewise, in *State v. Warren Star Theater*, 616 N.E.2d 1192 (Ohio App. 1992), the plaintiffs failed to show causal damages because the coverage didn’t exist in any policy. *Id*., at 441.

Alderman also tries to distinguish *Kabban v. Mackin*, 801 P.2d 883, 890 (Ore. 1990), a case cited in Emer’s brief, by claiming it only addressed “availability” because that was the only issue raised. (Alderman’s Brief, p. 13). To the contrary, the agent argued that plaintiff had to show availability *and* prove he “could have obtained such coverage.” *Id*., at 891. The court rejected the agent’s argument when it found the plaintiff met his burden by showing “coverage was generally available in the insurance industry.” *Id*.

Likewise, in *Morgan International Realty v. Dade Underwriters Insurance Agency*, 524 So. 2d 451 (Fla. App. 1988) the causation standard was again “whether the requested coverage was generally available in the insurance industry….” *Id*., at 452. Alderman attempts to distinguish this and a subsequent decision in the same case[1] by arguing that “even if a policy was generally available in the marketplace, the policy must provide the requested coverage or the agent’s negligence is irrelevant.” (Alderman’s Brief, p. 14). This assertion has no bearing on eligibility and only states the obvious. Coverage is not commercially available in the marketplace if no commercially available policy includes it.

In summary, the court was “clearly wrong” on the proper legal standard. Of the cases Alderman cites, only *Melin* and *Heller* explicitly require a plaintiff to prove “eligibility,” and their holdings were both qualified by subsequent decisions. *Melin* was modified by *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 49 (Minn. 1989), which allows damages when the plaintiff could have taken steps to prevent the loss. (see *infra*, pp. 11-12). *Heller* was modified by *Bayly*, which submits the case to the jury once the plaintiff meets her *prima facie* burden of showing general commercial availability. (see *supra*,

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1 *Morgan Int’l Realty v. Dade Underwriters Ins. Agency*, 617 So.2d 455 (Fla. App. 1993).

pp. 7-9). Alternatively, Alderman's "eligibility" evidence was sufficiently qualified that a jury could have "disagree[d] on the proper facts or inferences to be drawn therefrom,…." (see *supra*, pp. 8-9). *Mueller*, at ¶16.

2. Alternatively, Emer's damages were causal because she could have mitigated potential hail damage.

Alderman does not dispute *Melin* is inapplicable to a plaintiff who may choose not to engage in the uninsured activity. In such circumstances, "liability attaches independently of whether any insurance policies would have provided the requested coverage." *Runia,* at 49. Nonetheless, Alderman argues *Runia* does not apply here because Emer did not testify she would have chosen not to engage in the "uninsured activity." In fact, Emer could not have rejected coverage because she needed it for her "floor plan" loan from the bank to stay in business. (Alderman's Brief, p. 20). The problem with Alderman's argument is two-fold.

First, the question is not whether Emer would have rejected coverage and closed her business, but whether she could have taken steps to minimize the risk of a high deductible. Under *Runia*, damages are causal without regard to alternative coverage when the plaintiff could have avoided the risk. This same logic would apply to Emer, who could have minimized the risk of a high deductible had she known the coverage was not what she was led to believe.

Second, the precautionary measures available to Emer are easily inferred from the facts of record. For example, camper trailers are mobile, which means they could have been protected from hail had they been placed under cover or stored at different locations.

The lack of direct testimony from Emer does not defeat her claim. Such testimony would have been hypothetical in any event, and therefore neither determinative nor necessary. It's enough that Emer *could have* taken steps to mitigate her potential damages to create a question for the jury. Because a jury could reasonably infer Emer had mitigation options from the facts of record, she was entitled

to have the jury consider the extent to which her losses were caused by Alderman's misrepresentations.

II. ALTERNATIVELY, EMER WAS ENTITLED TO BENEFIT OF THE BARGAIN DAMAGES BECAUSE THE FACTS ALLEGED IN THE COMPLAINT SUPPORT BOTH BREACH OF CONTRACT AND STRICT RESPONSIBILITY MISREPRESENTATION CLAIMS.

1. Emer raised the argument in her petition for review.

Alderman complains that Emer forfeited this issue by not adequately raising it in her petition for review. He bases his argument on the Court's Order granting the petition, which states: "If the petition is granted, the parties cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court."

Emer did not expressly identify alternate causes of action as grounds for applying benefit of the bargain damages in her "issues presented for review." She did not exclude it either: "In a suit for failure to procure requested insurance, must the plaintiff prove causal damages by showing she could have personally obtained an insurance policy equal to or better than the policy promised to her by her agent?" (Emer's Petition for Review, p. 1). Emer, moreover, did summarize the argument in a long footnote on pages 13-14 of the petition. The argument was made to and decided by the court of appeals. (COA Decision, ¶13). Emer leaves it to this Court to decide whether the issue was sufficiently "set forth in the petition." If not, Emer would ask the Court, in its discretion, to allow consideration of this argument.

2. The circuit court decided the causation question as a matter of summary judgment and therefore was required to consider the measure of damages for all causes of action supported by the facts in the complaint.

In its written decision the trial court identified this "matter" as "having come before the Court through Defendant's Motion for Summary Judgment, or in the alternative, Directed Verdict…." (88:1). Emer argued to the court of appeals and this Court in her brief-in-chief that indeed the causation question was decided as a matter of summary judgment, as it had been previously, and therefore, the court erred when it did not consider other potential causes of action other than negligence in deciding causation. As both breach of contract and strict responsibility-misrepresentation are supported by the factual allegations in the complaint, as well as the trial record, a review of summary judgment must consider benefit of the bargain damages. As such, causation is established by what the agent promised or misrepresented, without regard to whether Emer could have obtained the promised terms from Alderman or another source. (See Emer's Brief-in-Chief, pp. 21-24).

Alderman argues the causation decision was not based on summary judgment for three reasons: 1) it doesn't matter that Alderman made reference to "prior summary judgment materials" in his argument to the court, because the court did not cite those materials in its decision. (Alderman's Brief, p. 29); 2) any argument concerning other causes of action were waived by failing to seek an amended complaint. (*Id.*, p. 30); and, 3) the facts at trial do not support either a breach of contract or strict responsibility—misrepresentation claim. (*Id.*, pp. 31-32).

Alderman's first argument is addressed in Emer's Brief-in-Chief and therefore will not be repeated. (See Emer's Brief-in-Chief, pp. 21-24). Alderman clearly "relied upon" summary judgment materials in making his argument, and the circuit court expressed reliance as well when it acknowledged its decision was based on testimony "it received today…as well as the transcript and documents provided,…" (108:148). The lack of citation to outside materials in the circuit court's decision does not mean they were not "relied upon" in making the decision.

Second, Emer did not waive her argument that the court decided causation as a matter of summary judgment because she did

not seek to amend the complaint pursuant to Wis. Stat. § 802.09.[2] Whether Emer sought to amend the complaint to conform to the evidence at trial has no bearing on a summary judgment review.

Third, the court should have considered all possible causes of action supported by the facts in the complaint in deciding how Emer had to prove causal damages. The allegations are straight forward. Alderman knew Emer wanted a policy with a $1,000 per unit deductible and he told her he obtained one when he didn't. (107:134-137, 147, 156, 158, 164; 77:2). Both the complaint and the evidence at trial support breach of contract and strict responsibility—misrepresentation claims which allow for benefit of the bargain damages.

CONCLUSION

This Court should reverse the circuit court's Order granting Alderman summary judgment (or a directed verdict) and remand the case for trial on the contested issues.

Respectfully submitted this 13th day of September 2019.

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2 Emer abandons any argument based on amending the complaint pursuant to Wis. Stat. 802.09.

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