No. 14-_____

IN THE

Supreme Court of the United States

JOHN E. STEVENSON and JANE E. STEVENSON,

Petitioners,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

DAVID H. WEBER
T. WICKHAM SCHMIDT
CONWAY, OLEJNICZAK & JERRY, S.C.
231 South Adams Street
Green Bay, WI 54301
(920) 437-0476

KENNETH CHESEBRO
Counsel of Record
1600 Massachusetts Ave., No. 801
Cambridge, MA 02138
kenchesebro@msn.com
(617) 661-4423

Attorneys for Petitioners

July 21, 2014

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether federal due process requires state-court judges, in reviewing jury-awarded punitive damages for constitutional excessiveness, to:

1. Use *de novo* review to set punitive damages at the level they find appropriate, without viewing the evidence in the light most favorable to the verdict, based on *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432-36 (2001), as courts in at least seven States (including the court below) hold; or, instead,

2. Use the rational-factfinder test of *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), viewing the evidence in the light most favorable to the verdict and upholding the maximum amount a rational jury could award on the record so viewed (measured by the relevant legal guideposts), based on *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429, 432 n.10 (1994), as courts in at least five States hold.

PARTIES TO THE PROCEEDING

Petitioners, John E. Stevenson and Jane E. Stevenson, were defendants (and plaintiffs on a cross-claim) in the trial court and appellants in the Wisconsin Supreme Court. Respondent, First American Title Insurance Company, was defendant in the trial court and respondent in the Wisconsin Supreme Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***CASES*:** ***PAGE*:**

***CASES (CONTINUED)*:** ***PAGE*:**

***CASES (CONTINUED)*:** ***PAGE*:**

***CONSTITUTIONS AND STATUTE*:**

BOOK AND ARTICLES:

CASE MATERIALS: ***PAGE***:

PETITION FOR A WRIT OF CERTIORARI

Petitioners John and Jane Stevenson respectfully submit this petition for a writ of certiorari to the Wisconsin Supreme Court.

OPINIONS BELOW

The decision of the Wisconsin Supreme Court (App., *infra*, 1a-40a) is reported at 845 N.W.2d 395. The decision of the intermediate appellate court (App., *infra*, 41a-59a) is unreported. The trial court's ruling on post-trial motions, from which appeal was taken (App., *infra*, 60a-62a), is unreported.

JURISDICTION

The Wisconsin Supreme Court issued its decision on April 22, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

INTRODUCTION

Petitioners are a husband and wife who were adversely affected by the bad-faith refusal of respondent insurer to honor a title insurance policy. In denying the policyholders' claim, the title insurer sought to evade coverage by misrepresenting key facts. At trial, the jury learned that when it denied the claim,

the title insurer knew it was liable under the policy and knew that the cost of honoring the policy would likely be $370,000. The jury awarded 2.8 times that figure — $1 million — as the punitive damages it considered appropriate to deter similar bad-faith conduct by insurers in the future. Affording deference to that factual determination, both the trial judge and the intermediate appellate court rejected the insurer's claim of constitutional excessiveness, and affirmed the punitive damages in full.

On discretionary review, the Wisconsin Supreme Court held that federal due process did not permit deference to the jury's factual determination of the amount of punitive damages appropriate to effect deterrence. It thereby joined a conflict involving the courts of at least a dozen States regarding the level of deference owed juries when judges engage in federal due process review of punitive damages awards. It is among the seven state courts (at minimum) that read this Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432-36 (2001), as requiring *de novo* review of jury verdicts, under which judges set punitive damages at amounts they find appropriate.

Courts in at least five States regard *Cooper Industries* as specifying merely the standard of review used by federal appellate courts in reviewing the legal conclusions of district courts on constitutional excessiveness. They hold that in engaging in federal due process review, state appellate courts and trial courts must view the evidence in the light most favorable to the verdict. Consistent with this Court's decision in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429, 432 n.10 (1994), they limit themselves to asking whether, on the record so viewed (measured by the relevant legal guideposts), a rational jury could have awarded the

amount the jury awarded. If the answer is no, they reduce the award to the maximum amount a rational jury could award, not the amount they find appropriate.

This case is an ideal vehicle through which to resolve the conflict among state courts concerning whether federal due process requires a standard of review for jury-awarded punitive damages less deferential than the rational-factfinder standard of *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) — the federal due process standard applicable in other contexts, both civil and criminal, in which the result reached in a case is attacked as insupportable on the record of the case. See pp. 20-23, *infra*. In this case the Wisconsin Supreme Court, on *de novo* review, held that federal due process required it to substitute its judgment for that of the jury, and it reduced the $1 million punitive damages award to the $210,000 it found appropriate. The consequence, the dissenting justices pointed out, is a sanction for the bad-faith breach of an insurance contract (including the compensatory damages) totaling *less* than the $370,000 it likely would have cost the insurer to timely honor the contract — so that in this case, federal due process has netted the insurer a profit from its misconduct. The conflict among the state courts concerning the standard of review has persisted for more than a decade. A grant of certiorari is amply warranted.

STATEMENT OF THE CASE

A. Statement of Facts

1. The Waterfront Property Purchased by the Kimbles

Petitioners John and Jane Stevenson have for many years lived and worked in the Green Bay, Wisconsin, area. In 1989 the Stevensons purchased a lot in the Town of Nasewaupee bordered by a lake on the east. Pet. App. 42a-43a. The Stevensons sold the southern portion (which included an old house) to purchasers who, in 2004, sold it to Robert and Judith Kimble for $355,000. *Id.*; 1 Trial Tr. 208.[1]

The Kimbles had the old house torn down and a new house erected. *Id.* at 176. In the spring of 2008, they offered the property for sale. Their asking price was $1.8 million, which they dropped to $1.5 million after becoming "desperate to sell" so that they could downsize and use the proceeds to aid Mrs. Kimble's parents who, in their mid-70s, "had lost everything," and even faced losing their home. *Id.* at 89, 192-93, 193-94, 226. In January of 2009, the Kimbles received an all-cash offer for $1.3 million, which they accepted. *Id.* at 187, 189, 191-92. The transaction was conditioned, as is typical, on the delivery of marketable title. Ex. 113. Unfortunately this turned out to be a sticking point, 1 Trial Tr. 200, through no fault of the Kimbles, who had been unaware of any title problems and who had purchased the property in 2004 in reliance on title

[1] Copies of the two-volume transcript of the jury trial conducted on March 2-3, 2011, and other cited record materials, are posted at http://blogs.law.harvard.edu/onfile/stevenson.

insurance issued by respondent First American Title Insurance Company. *Id*. at 171-72, 178-79.

2. The Title Insurance Claim Made by the Kimbles

Shortly after the Kimbles listed the property for sale, on March 5, 2008, their real estate agent received a letter from Land Concepts, Inc., a real estate development company holding land to the south, west, and north of the Kimbles, over which anyone residing on the Kimbles' property would have to pass to reach a public road. Pet. App. 4a; Tr. of Mar. 1, 2011, at 69. In a statement that would constitute slander of title, potentially triggering substantial liability if not true,[2] Land Concepts represented that the Kimbles' property enjoyed no valid easement over *any* of the property owned by Land Concepts, and hence it was completely landlocked. Ex. 108; Pet. App. 4a.

The allegation was not slanderous. Indeed, it was entirely true. As the trial judge ruled as a matter of law when the matter was ultimately litigated, the property the Kimbles purchased in 2008 was landlocked because neither of the recorded easements over Land Concepts'

---

[2] *E.g.*, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 448-51, 459-62 (1993) (plurality opinion) (affirming $10 million in punitive damages upheld by the West Virginia courts for fraudulent slander of title, 526 times the $19,000 in attorneys' fees incurred to clear up title). Wisconsin, like West Virginia, has upheld substantial punitive damages awards where necessary to deter intentional interference with property rights. *E.g.*, *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157, 160-61, 164-65 (Wis. 1997) (affirming $100,000 in punitive damages, on $1 nominal damages, for the delivery of a mobile home effected through an intentional, profit-motivated trespass on a neighbor's land, after permission to use the land was repeatedly refused).

land (one to the west and one to the north) satisfied the requirements of Wisconsin law.[3] Thus, unless matters somehow changed, the Kimbles would be unable to sell their home — indeed, their ability to travel to and from their own home was at the mercy of Land Concepts, which had the legal right to sue the Kimbles for trespass and also physically block access to the Kimbles' property.[4]

The Kimbles were shocked on learning of the letter from Land Concepts, having no prior notice of any such issues regarding access to their property. 1 Trial Tr. 171, 241, 250. Fortunately, in buying the property in 2004 they had purchased title insurance, in which First American promised to pay "the costs, attorneys' fees and expenses" incurred in defending the marketability of their title and their "right of access to and from the land" — and also pay any damages incurred, up to $370,000. Ex. 43 at 1, 4. Thus, upon receiving the letter, they looked to First American to resolve the

---

[3] Pet. App. 70a (trial court finding that a "lack of access affected the marketability of title"); *id.* at 49a-53a (summarizing why First American's assistant vice president was correct to conclude that the West Easement was invalid); *id.* at 54a ("First American has not argued or shown that the [trial] court was wrong in concluding that the Kimbles did not have the right to use what First American refers to as the 'north easement' to access their property.").

[4] The prospect that Land Concepts might physically bar the Kimbles' ability to travel over its land was hardly theoretical. At one point Land Concepts installed concrete posts on each side of the private road running through its land, so that to physically block the Kimbles from using vehicles to access their property it would merely need to install a chain and lock. 1 Trial Tr. 182.

situation for them, retaining an attorney who promptly made a written claim on their behalf.[5]

3. First American's Bad-Faith Denial of the Kimbles' Claim, and the $370,000 It Thereby Kept

The claim was handled on behalf of First American by Donald Schenker, its vice president and in-house lawyer, with 33 years of claims experience at the company. 2 Trial Tr. 9. Schenker realized the Kimbles had a serious problem: "the owner to all the property surrounding them was claiming that they couldn't cross their property at all . . . ." Tr. of Mar. 1, 2011, at 69.

After analyzing the relevant documents, he concluded (correctly, as the Wisconsin courts ultimately ruled, see note 3, *supra*) that neither of the recorded easements was valid, so the Kimbles' property was in fact landlocked. The West Easement was invalid because of multiple irregularities. Pet. App. 4a & note 8; Ex. 44 at 1-2. The North Easement which had once existed had terminated at least a year *before* the Kimbles' predecessors in title bought the lot later purchased (in part) by the Kimbles. 2 Trial Tr. 54-55, 60-63. Schenker knew that the Kimbles' predecessors in title "had no ability to receive from the sellers a warranty deed insuring a private road easement over

---

[5] In an e-mail to First American's local title agent (who had issued the policy), the Kimbles' attorney stated: "It is clear that Land Concepts is denying that there is any easement which serves this property and that it is thus landlocked. Obviously this matter needs to be straightened out as soon as possible since the Kimbles have their property up for sale." Ex. 105 (Mar. 18, 2008). In a followup e-mail, he stated that Land Concepts' letter is "a claim against the title since it challenges the right of access to the property," rendering "title unmarketable." Ex. 104 (Mar. 20, 2008).

[land now owned by Land Concepts] because it had already been sold without such an easement over it." *Id*. at 61; *see also id*. at 63 (easement favoring Kimbles "would not arise by a grant instrument from the burdened property owner").

As a lawyer with decades of experience in title insurance, Schenker knew that by insuring and committing to defend the Kimbles' marketable title, First American had promised they would enjoy a title "that can be held in peace and quiet; not subject to litigation to determine its validity; not open to judicial doubt." *Douglass v. Ransom*, 237 N.W. 260, 263 (Wis. 1931); *see also* Pet. App. 64a-66a. He also knew that First American had three lawful options for meeting its contract obligation to the Kimbles, 2 Trial Tr. 77-78, none of them particularly attractive.

First, it could attempt to litigate against Land Concepts (thereby sparing the Kimbles the burden of litigating), to establish the validity of at least one of the easements of record. This option would likely be a waste of time and money given Schenker's analysis showing that neither easement was valid.

Second, First American could attempt to negotiate a resolution of the problem with Land Concepts, by paying for an easement. If Land Concepts were a reasonable negotiating partner, this option would be viable, but Land Concepts was anything but reasonable. Schenker realized (as he contemporaneously put it in a letter) that Land Concepts was "opportunistic" and not open to a "reasonable proposal." 2 Trial Tr. 250 (quoting Ex. 66). It had long coveted the waterfront property bought by the Stevensons in 1989 (now partly owned by the Kimbles) which, when combined with its surrounding land, would enable it to build a 600-slip marina and resort hotel. 1 Trial Tr. 278. Land Concepts was "very upset" when the Steven-

sons declined to sell the property, and it engaged in "a lot of harassment," *id.* at 251, earning a bad reputation among its neighbors. *Id.* at 240. The Stevensons were even threatened with the collapse of their house, through the blasting of boat channels in the adjacent bay. *Id.* at 278. The Kimbles felt like victims of a "war" between Land Concepts and the Stevensons. *Id.* at 182, 196. A "feud" is the term used by First American's counsel. 2 Trial Tr. 356.

Because, as Schenker realized, Land Concepts was opportunistic and not open to a reasonable proposal, it was apparent that Land Concepts' letter to the Kimbles' real estate agent, emphasizing the importance of making "prospective purchases aware" that the Kimbles' property was landlocked, Ex. 108 at 1, reflected an interest not in pressuring the Kimbles to buy an easement, but in coercing the Kimbles to sell the entire property to Land Concepts at a cut-rate price.

The third lawful option available to First American, Schenker realized, would be to pay the Kimbles the $370,000 policy limits and walk away. Because the Kimbles had a "very substantial" claim (a new waterfront house worth more than $1 million with access, but worth little without access), under this option First American "would have paid them" the $370,000 policy limits "and walked because the policy has a coinsurance clause and they didn't buy additional insurance after they put the improvements on the property." 2 Tr. 81, 85 (reading Schenker Depo. 134-36). *See also id.* at 86 (reading Schenker Depo. at 151-52 (if access did not exist, Kimbles "had a real big claim on the policy")). While costly for First American in the short run, this option might well be the cheapest for First American in the long run. For under the policy, as long as First American had *not* paid out the entire $370,000 policy

limits, it faced the prospect of paying the considerable attorneys' fees and expenses involved in any effort to litigate or negotiate to establish access. Ex. 43 at 3, ¶ 4. By tendering the entire $370,000 immediately, First American could avoid these additional costs. *Id.* at 2-4, ¶ 6(a).

Faced with these three lawful options, acting on behalf of First American Schenker chose none of them. Instead, he resorted to deceit in an effort to avoid paying out the $370,000 policy limits. Responding to emails from the Kimbles' attorney noting that Land Concepts had rendered the Kimbles' title unmarketable, and calling on First American to solve the problem as soon as possible, see note 5, *supra*, Schenker denied there was any access problem at all. In support, he pointed to the North Easement, granted by the Kimbles' predecessors in interest. Ex. 44 at 3. But he concealed from the Kimbles' attorney the information needed to understand why the North Easement was no longer in effect: the original owner of all the land containing the easement had conveyed part of it to another party, a year *before* the remainder was conveyed to the Kimbles' predecessor in interest (which thereby had no easement to convey). Pet. App. 4a-5a.

"First American knew the North Easement was defective and concealed that information from the Kimbles." Pet. App. 8a. Indeed, at trial Schenker admitted he knew about the earlier conveyance but did not disclose it to the Kimbles' attorney, 2 Trial Tr. 54-55, 60, 62, even though it was "a material piece of information." *Id.* at 64. Even when he learned two months later that the Kimbles' attorney was relying (in formulating strategy against Land Concepts) on Schenker's incomplete representations concerning the supposed validity of the North Easement, he did not disclose it. *Id.* at 87-90. In an effort to avoid paying out

the $370,000 policy limits, Schenker concealed the invalidity of the North Easement even though he knew that First American had a "duty of fair dealing" and "of good faith" in handling the insurance policy, *id*. at 153 (reading Schenker Depo. 39), and that Wisconsin insurance regulations prohibit "[k]nowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverages involved." *Id*. at 156.

4. How First American's Misconduct Injured the Kimbles and the Stevensons, Leading to Litigation

Relying on First American's assurances that their title was marketable because their land supposedly was accessible through the North Easement, the Kimbles continued listing their home for sale. Pet. App. 5a-6a. In January, 2009, the Kimbles received an all-cash offer for $1.3 million, which they accepted. 1 Trial Tr. 187, 189, 191-92. The only condition was that the Kimbles establish clear legal access to the property. *Id.* at 190, 194-95. In the several months before the offer had been made, Mrs. Kimble had "spent hours upon hours" with First American's local title agent, trying to resolve the problem, but "got nowhere as a result of that." *Id*. at 219. First American was completely "unresponsive" in terms of help. *Id*. at 235. Left to fend for themselves, in an effort to complete the sale the Kimbles tried to negotiate an easement with Land Concepts. The effort was fruitless: given its long-running feud with the Stevensons, it indicated that it would "never" convey an easement that might even indirectly benefit the Stevensons. *Id*. at 196.

Because they could not satisfy the sole condition on the all-cash deal, the Kimbles lost the sale. *Id*. at 200.

They have had no offers since then, and they still live in the home. *Id*. at 200, 255.

After the sale fell through, the Kimbles were forced to turn to litigation in an effort to defend the marketability of their title which First American had refused to defend. They sued Land Concepts in an effort to establish an easement either to the west or the north, and they sued two predecessors in title, including the Stevensons, who had warranted marketable title. Pet. App. 6a. The Kimbles felt "awful" having to sue the Stevensons, who had always been "very courteous, respectful, kind neighbors," 1 Trial Tr. 202-03, and the Stevensons "were very surprised by that, not quite understanding why [they] were also part of the lawsuit." *Id*. at 298. In an effort to force First American to fulfill its obligations under the title insurance policy, the Kimbles also sued First American. Pet. App. 6a.

Eventually, after Land Concepts' plans for developing its land apparently had changed, and it became open to negotiation, in January, 2010, the Kimbles' attorney wrote First American indicating that he believed all the litigation could be resolved for $50,000, with most of the money going to Land Concepts and the rest going to the Kimbles — and with First American having to contribute no more than $25,000. Ex. 127 at 2-3; 2 Trial Tr. 208-09. Still unaware that First American's vice president, Donald Schenker, had known about, but concealed, the invalidity of the North Easement in his March, 2008, letter, the attorney complained that "First American should have discovered this and stepped up to the plate in March/April 2008 rather than forcing the Kimbles to spend another two years (and close to $20,000.00) to try to resolve the access issue . . . ." Ex. 127 at 2.

Yet First American remained unwilling to pay anything to assist the Kimbles in establishing marketable title. Its position was that it "was right in denying coverage in the first place," based on the supposedly valid North Easement. 2 Trial Tr. 168-69. As Schenker later testified, despite the policy language requiring First American to pay the attorneys' fees and costs involved in defending the marketability of title when it is called into question, and despite Wisconsin law defining marketable title as including freedom from litigation, see p. 8, *supra*, the company's practice is to do nothing as long as it "can come up with an argument that a case could be made for some sort of easement," Tr. of Mar. 1, 2011, at 91 — the burden is on the policyholder to prove otherwise, *id.* at 92, even where (as here) the company has concealed information proving its argument meritless. Specifically, before First American would have any obligation to do anything, the policyholder would need to file a lawsuit and prove that, in fact, the property is landlocked. 2 Trial Tr. at 163-64.

Due to the title problems, the Kimbles had been unable to get a home equity loan to pay additional attorneys' fees. 2 Trial Tr. 222. Even at this juncture, nearly two years after the Kimbles' title was first attacked, First American offered nothing to assist with a settlement that would secure marketable title (it did not even respond to the settlement proposal). So the Kimbles gave up on First American and worked out a settlement with the other parties. 1 Trial Tr. 219, 235; 2 Tr. 213-18. Under the July, 2010, settlement, the Stevensons paid the entire $50,000. Land Concepts received $40,000 in exchange for granting a new West Easement (matching an existing private road). The Kimbles, having already incurred more than $27,000 in attorneys' fees and expenses, and unable to afford

continued litigation against First American, 1 Trial Tr. 183, decided to cut their losses. They assigned their contract and bad-faith claims against First American to the Stevensons in exchange for $10,000, Pet. App. 6a, as authorized under Wisconsin law. Pet. App. 47a-49a.

B. Proceedings Below

1. The Trial Court Rules That First American Breached Its Contract With the Kimbles By Refusing to Defend Their Title

In August, 2010, the Stevensons filed a cross-claim against First American, asserting the claims against First American that had been assigned to them by the Kimbles. Pet. App. 6a. On March 1, 2011, following an evidentiary hearing requested by First American, the trial court held as a matter of law "that title to the Kimble Lot was rendered unmarketable by the access dispute," Pet. App. 8a, and that "there was a duty to defend." Pet. App. 70a. *See also id.* at 66a ("I don't know what could affect marketability of title more than somebody trying to sell their property and their realtor getting a letter . . . from a neighbor saying, 'You don't have access to that property.'"); *id.* at 70a ("I'm determining that this lack of access affected the marketability of the title. . . . [W]hat loss or what amount of damage the jury is or is not going to find as a result of that, that's the issue [for trial].").

2. The Jury Finds Bad Faith and Awards $1 Million in Punitive Damages

A two-day jury trial was then held, featuring the evidence described above "that First American was obligated to defend the Kimbles' title and failed to do so" and that "First American knew the North Easement was defective and concealed that information from the Kimbles." Pet. App. 8a.

The jury was charged that it could award punitive damages only if First American had "no reasonable basis" for refusing to defend the Kimbles' title and its misconduct exhibited either malice or intentional disregard of the Kimbles' rights. 2 Trial Tr. 323-25. If it so found, it was charged to set punitive damages at a level adequate to "deter the wrongdoer and others from engaging in similar conduct in the future." *Id*. at 326.

The jury concluded that First American breached its contract with the Kimbles and acted in bad faith by refusing to defend their title. *Id*. at 399. It awarded $50,000 in compensatory damages and $1 million in punitive damages. *Id*. at 399-400.

3. The Trial Judge and Intermediate Appellate Court Defer to the Jury, Upholding the Punitive Damages

On post-trial motions, the trial judge reduced the compensatory damages to $29,738.49 (the total attorneys' fees and costs incurred by the Kimbles in clearing up their title), Pet. App. 61a, agreeing with First American that the evidence of other pecuniary harm to the Kimbles was too speculative to support the jury's $50,000 verdict (the non-economic harm suffered

by the Kimbles not being compensable under Wisconsin law). Tr. of May 27, 2011, at 5-12.

Observing that the jury's award of punitive damages carried a "strong presumption" of validity, *id.* at 27, the trial court declined to disturb the $1 million punitive damages verdict, which was less than three times the $370,000 policy limits that First American avoided paying out in 2008 by deceiving its insured and refusing to defend their title. See pp. 7-11, *supra*. Noting it was "obvious that the jury did not accept portions of Mr. Schenker's testimony," Tr. of May 27, 2011, at 19, and that its verdict was intended "to be a message sending verdict," *id.* at 28, the trial court had "no problem" deferring to the jury's decision that $1 million in punitive damages was needed for deterrence. "[W]hat I would have come up with if I was sitting on this jury as a punitive damages award is irrelevant. I'm not going to substitute my judgment . . . for the jurors." *Id.* at 29.

On First American's appeal as of right, the intermediate appellate court affirmed on all issues. Pet. App. 41a-59a. It declined to reach the merits of First American's argument that the punitive damages award was unconstitutionally excessive, finding procedural default due to First American's failure to summarize the evidence "in the light most favorable to the plaintiff" (its brief set forth "only broad and conclusory statements without citation to the record"). Pet. App. 59a & n.4.

4. Holding *De Novo* Review is Required by Federal Due Process, the Wisconsin Supreme Court Sets Punitive Damages at $210,000

The Wisconsin Supreme Court granted discretionary review. By a 4-to-2 margin (one justice recused), it held that the $1 million in punitive damages violates federal due process. Pet. App. 12a-24a. Unlike the lower courts, it did not limit itself to viewing the evidence in the light most favorable to the plaintiff, nor did it accord deference to the jury verdict. It read *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001), as requiring *de novo* review of a jury's conclusion regarding the amount of punitive damages necessary to effect deterrence. Pet. App. 11a-12a. Under *Cooper Industries*, it concluded, only the jury's "decision to award punitive damages is accorded deference"; the amount of punitive damages must be reviewed *de novo*, with no deference to the jury. Pet. App. 12a. *See also* Pet. App. 14a n.17 ("Given that punitive damages awards mandate *de novo* review," language in past punitive damages cases requiring that the evidence must be viewed in the light most favorable to the plaintiff "should not be read to require deference to the amount of the jury's award.").[6]

---

[6] This ruling, that in punitive damages cases the evidence is not to be viewed in the light most favorable to plaintiff, was contrary to the parties' understanding of settled law. Brief of Appellant-Defendant-Petitioner in *Kimble v. Land Concepts, Inc.* (Wis. Sup. Ct. No. 2011AP1514), Aug. 12, 2013, at 13 ("In conducting its review of the record, the court construes the evidence viewed in the light most favorable to the verdict.") (citing *Trinity Evangelical Lutheran Church & Sch. Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 800-01 (1996)); Brief of Respondents, John and Jane Stevenson, Oct. 29, 2013, at 21-22 (same).

On *de novo* review of the entire record, with no deference to the jury, while finding that First American's conduct "is reprehensible," Pet. App. 17a, the court held that the $1 million in punitive damages "does not comport with due process." *Id*. 22a. It concluded "that the appropriate amount of punitive damages in this case is $210,000." *Id*. at 23a-24a. Its analysis took no account of the evidence that in March, 2008, when First American refused to defend the Kimbles' title based on the false representation that a North Easement existed, First American perceived that its most cost-effective option for honoring its contract with the Kimbles would likely require paying $370,000 — a point that had been briefed to the court.[7]

Addressing this point, the two dissenting justices criticized the majority opinion for invoking federal due process, enhanced by *de novo* review, to "make First American's wrongdoing an efficient way of doing business," given that the "combined punitive and compensatory damages amount to $239,738.49," much less than the $370,000 First American likely saved through its misconduct. Pet. App. 24a-25a (Abrahamson, C.J., joined by Bradley, J., dissenting). *See also id.* at 34a-35a ("As First American's agent stated in a deposition entered into evidence at trial, the risk of wrongly denying the claim was that the Kimbles 'would have a real big claim on the policy . . . .'"); *id.* at 36a ("the proper potential harm is at least the policy limits of $370,000"). The dissenters concluded: "The majority opinion makes First American's wrongdoing an efficient course of business. First American in fact pays less by acting in bad faith and wrongfully refusing to

---

[7] Brief of Respondents, John and Jane Stevenson, in *Kimble v. Land Concepts, Inc.* (Wis. Sup. Ct. No. 2011AP1514), Oct. 29, 2013, at 42-43.

pay the Kimbles' claim than it would have paid had it honored the claim in good faith after discovering its error." *Id*. at 39a.

This petition seeking review of the Wisconsin Supreme Court's reduction of the Stevensons' punitive damages award based on its ruling that federal due process mandates *de novo* review of punitive damages verdicts, with no deference to the jury, follows.

REASONS FOR GRANTING THE PETITION

Summary of Argument

1. For decades, this Court has endorsed the use of the rational-factfinder test (formalized in *Jackson v. Virginia*, 433 U.S. 307, 318-19 (1979)) in a myriad of criminal and civil contexts in which the result reached in a case is attacked as insupportable on the record. The decision below is irreconcilable with this line of authority and with opinions in several of this Court's punitive damages cases. Because the rational-factfinder test supplies adequate due process for review of *criminal* jury verdicts which deprive a capital defendant of his or her life, it necessarily must be regarded as adequate for review of *civil* jury verdicts which deprive the defendant of only money. This Court should grant review of this case to so hold.

2. Considerable confusion and conflict exist in the state courts concerning how much, if any, deference is owed juries on federal due process review of the amount of punitive damages. Courts in at least five States use the rational-factfinder test, viewing the evidence in the light most favorable to the verdict, deferring to juries, and reducing punitive damages verdicts only to the maximum amount a rational jury could award on the record (measured by the relevant

legal guideposts). But courts in at least seven States (including Wisconsin), based on their reading of this Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432-36 (2001), engage in *de novo* review, do not view the evidence in the light most favorable to the verdict, show no deference to juries, and set punitive damages at amounts they find appropriate. Most courts have articulated no clear view on the level of deference owed juries in reviewing punitive damages awards, adding to the confusion in this often-litigated area. Regardless of which standard, or any variant, this Court is inclined to adopt, this Court should grant certiorari to resolve the confusion left in the wake of its past decisions and thereby bring greater uniformity and coherence to federal due process review of punitive damages.

I. The Wisconsin Supreme Court's Ruling Is Wrong and Irreconcilable With Decisions of This Court Stretching Back Decades

For decades this Court has endorsed the use of a rational-factfinder test in a myriad of criminal and civil contexts in which the result reached in a case is attacked as insupportable on the record. The Wisconsin Supreme Court's decision, reducing the Stevensons' punitive damages award based on its holding that federal due process requires *de novo* review, without construing the evidence in the light most favorable to plaintiff, and with no deference to the jury, is irreconcilable with this line of authority.

In *Jackson v. Virginia*, 433 U.S. 307, 318-19 (1979), this Court held that where a criminal defendant challenges the result of a trial based on the particular evidence heard by the jury, judges must defer to the jury's role as factfinder. On a federal due process

challenge (in *Jackson*, a federal habeas petition), both trial judges and appellate judges ask only whether "*any* rational trier of fact" could have arrived at the jury's result under the governing law, with "*all of the evidence* . . . considered in the light most favorable to the prosecution." *Id.* at 319. The test is an objective one which focuses on the corpus of evidence that was before the jury. It "does not permit a court to make its own subjective determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached" based on "scrutiny of the reasoning process actually used by the factfinder — if known." *Id.* at 319-20 n.13.[8] *See also Herrera v. Collins*, 506 U.S. 390, 402 (1993) (review under *Jackson* "does not focus on whether the trier of fact made the *correct*" decision, but rather on "whether it made a *rational* decision").

"This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson*, 433 U.S. at 319.

---

[8] Much more latitude to second-guess the jury is available to trial judges under their long-recognized authority, acting as the "thirteenth juror," to grant new trials based on the weight of the evidence. *See generally* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2806, 2807 (2012); 5 MARK S. RHODES, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 33:29 (2d ed. 1987 & Supp. 2013). In sharp contrast to this weight-of-the-evidence test, under the rational-factfinder test, "[e]ven the trial court, which has heard the testimony of witnesses firsthand, is not to weigh the evidence or assess the credibility of witnesses . . . ." *Burks v. United States*, 437 U.S. 1, 16 (1978).

Even before *Jackson*, this Court employed a similar test in reviewing liability determinations in civil litigation. *E.g.*, *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943) (issue should be taken away from jury if, based on the record, "without weighing the credibility of the witnesses there can be but one reasonable conclusion"). After *Jackson* this Court employed its rational-factfinder language in the summary judgment context in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), stating that, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" while making clear that the inferences that may be drawn from the evidence must be "'viewed in the light most favorable to'" the nonmovant. *Id.* at 587 (citations omitted). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), extended the rational-factfinder test to rulings on motions for judgment as a matter of law. *Id.* at 148-51.

The rational-factfinder test is not limited to liability matters. It has long been used by the lower federal appellate courts in reviewing attacks on the size of a jury's compensatory damage award, starting with *Glazer v. Glazer*, 374 F.2d 390 (5th Cir. 1967) (Wisdom, J.), in which the court struck down a $1.9 million compensatory award for breach of contract, holding the verdict "excessive as a matter of law in that it exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before the jury." *Id.* at 413. Judge Posner has been particularly influential in explaining the basis for using this

test for review of compensatory damages, and in illustrating its proper application.[9]

The rational-factfinder test also applies to review of issues bearing on punishment in certain criminal contexts. In a capital case on federal habeas review, when a court decides whether the record supports a finding of a particular death-qualifying "aggravating circumstance," it may not engage in *de novo* review; rather, this Court has held, the "more appropriate standard of review is the 'rational factfinder' standard established in *Jackson*." *Lewis v. Jeffers*, 497 U.S. 764, 780-81 (1990). *See also id.* at 781-84; *Kemp v. State*, 919 S.W.2d 943, 953-54 (Ark. 1996) (applying *Jackson* to "aggravating circumstance" issue on direct review); *Martinez v. Johnson*, 255 F.3d 229, 244-45 (5th Cir. 2001) (applying *Jackson* to sufficiency challenge to finding of future dangerousness); *Green v. Johnson*, 160 F.3d 1029, 1046-47 (5th Cir. 1998) (applying *Jackson* to sufficiency challenge to finding of deliberateness).

Obviously, a defendant in a punitive damages case facing not the deprivation of life, but merely the deprivation of property (money required to satisfy the

---

[9] *See Kasper v. St. Mary of Nazareth Hosp.*, 135 F.3d 1170, 1177 (7th Cir. 1998) ("Courts apply a bottom-line test to a jury's assessment of damages: if the jury could by a proper procedure have arrived at the amount it awarded, we do not insist on a showing that it did use a proper procedure."); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182, 186 (7th Cir. 1997) ("It is enough . . . that a rational jury could have come to such a verdict"). *See also Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000); *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1228-30 (7th Cir. 1995); *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971-74 (7th Cir. 1983); *Bosco v. Serhant*, 836 F.2d 271, 279-80 (7th Cir. 1987); *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 382-83 (7th Cir. 1986).

judgment), would have difficulty arguing for any closer scrutiny of an adverse jury verdict. The civil defendant in *Honda Motor Co. v. Oberg,* 512 U.S. 415 (1994), in urging that federal due process entitles punitive damages defendants to *some* judicial review, did not even try. Represented by a leading member of the bar of this Court, when pressed on the matter Honda acknowledged that the rational-factfinder test is appropriate in the punitive damages context.[10]

This Court agreed with Honda that Oregon's constitutional provision barring its judges from conducting *any* review of the amount of punitive

---

[10] At oral argument Honda's counsel, former Deputy Solicitor General Andrew L. Frey, when questioned by Justice O'Connor as to "why should the constitutionally mandated review be any more than is required in a criminal case" under "the *Jackson* standard," answered: "I have no problem with that standard. That's what we would like to see the Court supply." Transcript of Oral Argument (Apr. 20, 1994), 1994 U.S. Trans. LEXIS 150, at *13-*14 (audio, beginning at 14:00, available at http://www.oyez.org/cases/1990-1999/1993/1993_93_644).

The position that a rational-factfinder test should govern due process review of punitive damages awards was also advanced in one of the principal *amicus* briefs filed on behalf of Honda, submitted by Dean Erwin N. Griswold. That brief suggested that "courts should be required to consider whether a particular award is rationally related to the goals of deterrence and punishment." Brief *Amici Curiae* for the American Council of Life Insurance, et al., in No. 93-644 (filed Feb. 28, 1994) at 13-14. More concretely, Dean Griswold urged: "to ensure that courts consult something other than their own preconceptions in evaluating the rationality of such awards, courts should be required to consider certain objectively measurable indicia of what amounts are reasonably necessary to serve the goals of deterrence and punishment," in the form of "a non-exclusive list of factors" for courts to consider in analyzing the rationality of an award. *Id.* at 14. This approach was adopted two years later in *BMW of North America, Inc.* , 517 U.S. 559, 575-86 (1996).

damages violated due process, *id*. at 430-32, given that a defendant's right not to be "subjected to punitive damages of arbitrary amounts" requires judicial review to ensure there is "evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." *Id*. at 429. But this Court did not purport to define the minimum test required by due process in the punitive damages context. It left open the possibility that a variant of *Jackson*'s rational-factfinder test might satisfy due process — a "verbal formulation[]" of the review standard perhaps "more deferential" than rationality, such as review for "passion and prejudice," might also be constitutionally adequate, at least if construed as the "rough equivalent" of *Jackson*'s rational-factfinder test. *Id*. at 432 n.10.

Oberg's embrace of the rational-factfinder test is no anomaly. Majority or concurring opinions in most of this Court's punitive damages cases going back a quarter century also support its use. For example, in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1989), this Court acknowledged defendants' "interest in rational decisionmaking," *id*. at 20, and noted how Alabama's system of judicial review ensures that the awards ultimately upheld are "rational in light of their purpose" to punish and deter. *Id*. at 21.

Justice Kennedy was the first to cite *Jackson* in a punitive damages case, observing: "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring in part and concurring in the judgment) (citing *Jackson*). The fundamental due process principle at work in this context, he emphasized, is protection against "arbitrary or irrational deprivations of property." *Id*. at 467. Thus the issue in any given

case is whether a punitive damages award reflects "a rational concern for deterrence and retribution . . . ." *Id*. After examining the record evidence, Justice Kennedy voted to affirm the $10 million punitive damages award, concluding that "it was rational for the jury to place great weight on the evidence of TXO's deliberate, wrongful conduct," and for that reason the award "did not amount to an unfair, arbitrary, or irrational seizure of TXO's property." *Id*. at 469.

The following year, in *Oberg*, as already noted, the Court established the due process requirement of judicial review to confirm there is "evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." 512 U.S. at 429.

The function of due process review of ensuring that punitive damages are rationally justifiable, based on the record evidence, was emphasized in Justice Breyer's concurrence in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 586 (1996) (Breyer, J., joined by O'Connor and Souter, JJ., concurring). He noted, for example, the value of considering the defendant's profit from its misconduct — a factor that "has the ability to limit awards to a fixed, rational amount." *Id*. at 591. Agreeing with Justice Kennedy's *TXO* concurrence, Justice Breyer emphasized that analysis of the rationality of a punitive damages award should be conducted on the basis of "the facts that [are] before the court," not "on the basis of some conceivable set of facts" (the standard applicable to rationality review of legislation). *Id*. at 593-94.

In *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), a majority of this Court for the first time explicitly referenced the rational-factfinder test in holding that a punitive damages verdict was excessive. After a detailed analysis of the record

evidence, *id*. at 419-28, in his opinion for the Court Justice Kennedy held that the $145 million in punitive damages awarded by the jury "was an irrational and arbitrary deprivation of the property of the defendant." *Id*. at 429.

The decision of the Wisconsin Supreme Court, holding that federal due process requires judges to conduct *de novo* review of the amount of punitive damages, without viewing the evidence in the light most favorable to the plaintiff, and with no deference to the jury, see p. 17, *supra*, obviously is irreconcilable with the above. Only some sort of "super due process" theory could justify requiring that jury verdicts imposing punishment be treated as merely advisory. But even in the capital punishment context, from which that theory emerged,[11] this Court has held that the rational-factfinder test satisfies due process when judges review factual determinations made by juries which lead to a sentence of death. See p. 23, *supra*. The *de novo* review standard applied by the Wisconsin Supreme Court (and other courts, see pp. 30-31, *infra*) contradicts this line of decisions and calls into question the practice of nearly all States that have the death penalty of according juries final sentencing authority in capital cases. *Harris v. Alabama*, 513 U.S. 504, 516 (1995) (Stevens, J., dissenting) (citation omitted) (as of 1994, in 29 of the 33 States which involved the jury in capital sentencing, the jury's decision was final; in only four States was the jury relegated to an advisory role). Surely if due process relegates a jury in a punitive damages case to an advisory role, the same must hold for juries in a capital case.

---

[11] *E.g.*, Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process of Death*, 53 S. CAL. L. REV. 1143 (1980).

The Wisconsin Supreme Court's sole basis for holding that federal due process required it to disregard the Stevensons' jury right, *see* WIS. CONST. art. I, § 5 ("The right of trial by jury shall remain inviolate"), and treat the jury's punitive damages verdict as merely advisory, was this Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001). *See* Pet. App. 11a-12a.[12] But *Cooper Industries* was not a federal due process holding; indeed, it did not address the division of authority between judge and jury in state-court punitive damages cases at all. The Court merely exercised its supervisory authority over the lower federal courts "to resolve confusion among the Courts of Appeals" as to the proper standard for reviewing a district court's *legal* conclusion on the issue of constitutional excessiveness. *Id.* at 431. It held only that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards." *Id.* at 436. *See also id.* at 440 (analyzing relative "institutional competence of trial judges and appellate judges" regarding various elements of the required legal analysis in punitive damages cases).

---

[12] For an analysis of federalism issues created by interpreting *Cooper Industries* as imposing a due process rule that relegates juries to advisory status, thereby overriding state constitutional provisions (more expansive than the Seventh Amendment) that the right of jury trial shall remain "inviolate," *see* Lisa Litwiller, *Re-Examining* Gasperini: *Damages Assessments and Standards of Review*, 28 OHIO N.U. L. REV. 381, 381-84, 410-11, 426-42 (2002). *See also* William V. Dorsaneo III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1699 (2001) ("the power of the jury to draw inferences from the evidence . . . is the most critical component of the right to trial by jury").

The decision below is fundamentally incompatible with multiple strands of this Court's jurisprudence and finds no support in the only decision of this Court cited. Even if the court below were alone in its error, review of this case would be warranted (perhaps through a summary disposition) to ensure conformity with this Court's decisions. But the court below is, unfortunately, not alone in its error, as we next show in describing the conflict among the state courts concerning whether the rational-factfinder test applies to federal due process review of jury-awarded punitive damages.

II. The State Courts Are in Conflict Over Whether The Rational-Factfinder Test Applies to Federal Due Process Review of Jury-Awarded Punitive Damages

A fundamental conflict exists between the courts of at least a dozen States concerning whether judges are required by due process to use a standard of review less deferential to the trier of fact than "the standard this Court articulated in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (whether 'no rational trier of fact could have' reached the same verdict)." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994). Courts in at least seven States (including Wisconsin), read *Cooper Industries* as requiring state courts to engage in *de novo* review and set punitive damages at the level they find appropriate (without construing the evidence in the light most favorable to the verdict), as the Wisconsin Supreme Court did in this case. See p. 17, *supra*. Courts in at least five States, consistent with this Court's *Oberg* decision, use a rational-factfinder test, applying the relevant legal factors to decide not what amount of punitive damages they find appropriate, but only whether the award is within the amount a rational

juror could have awarded (with the evidence viewed in the light most favorable to the plaintiff).[13] A conflict has existed for more than a decade. Review should be granted to resolve the conflict left in the wake of this Court's past decisions.

A. States Using *De Novo* Review

Alabama. *Horton Homes, Inc. v. Brooks*, 832 So.2d 44, 57 (Ala. 2001) (on de novo review of punitive damages, judges "must review the evidence and the law without deference to the jury's award") (citing *Cooper Industries*); *Acceptance Ins. Co. v. Brown*, 832 So.2d 1, 24 (Ala. 2001) (holding *Cooper Industries* requires *de novo* review); *Orkin Exterminating Co., Inc. v. Jeter*, 832 So.2d 25, 39 (Ala. 2001) (same).

Arizona. *Nardelli v. Metropolitan Group Property and Cas. Ins. Co.*, 277 P.3d 789, 806 (Ariz. App. 2012) ("we are obligated to review de novo the amount of punitive damages awarded here," reviewing both "constitutional principles and the record" de novo).

Idaho. *Weinstein v. Prudential Property and Cas. Ins. Co.*, 233 P.3d 1221, 1260 (Idaho 2010) ("We conduct a de novo review of the constitutionality of the amount of a punitive damages award," with the evidence not construed "in a light most favorable to the party who prevailed") (citing *Cooper Industries*).

Louisiana. *Mosing v. Domas*, 830 So.2d 967, 974-75 (La. 2002) (in punitive damages cases, *de novo*

---

[13] The law of many other States is unclear, or mixed, concerning how much deference juries are accorded under federal due process review of punitive damages. Given space constraints, this petition addresses only States that clearly use the rational-factfinder test and others that clearly use its polar opposite: *de novo* review with no deference to the jury.

review is required "when an appellant has properly raised a federal due process claim," with no deference given "to the trier of fact's determination as to the appropriate amount of the award").

Mississippi. *American Income Life Ins. Co. v. Hollins*, 830 So.2d 1230, 1242-43 (Miss. 2002), *overruled on other grounds*, *Miadineo v. Schmidt*, 52 So.3d 1154, 1165-66 (Miss. 2010) (on a federal due process challenge to a punitive damages award, we must "review all of the facts, evidence and law anew," becoming "the finder of fact, and the verdict maker") (citing *Cooper Industries*).

New Mexico. *Aken v. Plains Elec. Generation & Transmission Co-op, Inc.*, 49 P.3d 662, 668 (N.M. 2002) (recognizing "inexplicitness" of *Cooper Industries* decision, and reading it not as an exercise of this Court's "supervisory authority over the federal courts," but as imposing "de novo review as a matter of federal constitutional imperative" — requiring "an independent assessment of the record," with the evidence not "viewed in the light most favorable to" plaintiff).

B. States Using the Rational-Factfinder Test

California. *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 81-82 (Cal. 2005) (court's task is to determine "the maximum award of punitive damages consistent with due process," and "not to find the 'right' level in the court's own view" — a court "does not sit as a replacement for the jury but only as a check on arbitrary awards"); *Johnson v. Ford Motor Co.*, 113 P.3d 82, 97 (Cal. 2005) (remanding "for a new determination of the maximum constitutional award").

Massachusetts. *Bain v. City of Springfield*, 678 N.E.2d 155, 162 (Mass. 1997) ("to meet the requirements of due process," review of punitive damages

should ensure they do not "exceed the norms of rationality") (citing *Oberg*).

Oregon. *Oberg v. Honda Motor Co., Ltd.*, 888 P.2d 8, 10-12 (Or. 1995), *cert. denied*, 517 U.S. 1219 (1996) (on remand, reading this Court's *Oberg* decision as authorizing a rational-factfinder standard for review of a punitive damages award, to ensure that the award is "within the range that a rational juror would be entitled to award in the light of the record as a whole"); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 482-85 (Or. 2001) (holding that rational-factfinder standard approved in *Oberg* was not supplanted by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)); *id*. at 485 ("because the amount necessary to punish what has occurred and deter its repetition is a question for the jury . . . the reviewing court must review the facts in the light most favorable to the jury's verdict"); *Goddard v. Farmers Inc. Co. of Oregon*, 179 P.3d 645, 659 (Or. 2008) (court's task is "to determine the maximum constitutionally permissible punitive damages award" supported by the record). *See also* Or. Rev. Stat. § 31.730(2) (codifying rational-juror test for punitive damages); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 573-74 (Or. App. 2003) (rejecting argument that *Cooper Industries* requires de novo review).

South Carolina. *Atkinson v. Orkin Exterminating Co., Inc.*, 604 S.E.2d 385, 390 (S.C. 2004) (holding that punitive damages award "constitutes an irrational and arbitrary deprivation of property"); *Hollis v. Stonington Development, LLC*, 714 S.E.2d 904, 915 (S.C. App. 2011) ("[W]e are not permitted to make the determination independent of the jury of what we think the appropriate amount of punitive damages should be in this case."); *id*. at 916 ("We may not usurp the jury's function and set the amount we believe to be

appropriate. . . . [W]e may reduce it only to the upper limit of what would be acceptable under due process.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID H. WEBER
T. WICKHAM SCHMIDT
CONWAY, OLEJNICZAK & JERRY, S.C.
231 South Adams Street
Green Bay, WI 54301
(920) 437-0476

KENNETH CHESEBRO
Counsel of Record
1600 Massachusetts Ave., No. 801
Cambridge, MA 02138
(617) 661-4423
kenchesebro@msn.com

Attorneys for Petitioners

July 21, 2014

APPENDIX

TABLE OF APPENDICES

APPENDIX A

NOTICE
This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2011AP1514
(L.C. No. 2009CV188)

STATE OF WISCONSIN: IN SUPREME COURT

ROBERT L. KIMBLE and JUDITH W. KIMBLE, *Plaintiffs*, v. LAND CONCEPTS, INC., JOHN E. STEVENSON and JANE E. STEVENSON, Trustees of the John E. and Jane E. Stevenson Revocable Trust, DORENE E. DEMPSTER and MARK F. HERRELL, *Defendant-Appellant*, JOHN E. STEVENSON and JANE E. STEVENSON, *Defendants-Respondents*, FIRST AMERICAN TITLE INSURANCE COMPANY, *Defendant-Appellant-Petitioner*.	)	FILED Apr 22 2014

REVIEW of a decision of the Court of Appeals.

Reversed and cause remanded.

¶ 1 ANNETTE KINGSLAND ZIEGLER, J. This is a review of an unpublished decision of the court of appeals, *Kimble v. Land Concepts, Inc.*, No. 2011AP1514, unpublished slip op. (Wis. Ct. App. Oct. 11, 2012), affirming the judgment of the Door County Circuit Court,[1] upholding a jury award of punitive damages against First American Title Insurance Company ("First American").

¶ 2 First American argues that the punitive damages award against it was excessive and violated its right to due process
under the United States and Wisconsin constitutions.[2]

¶ 3 John E. and Jane E. Stevenson ("Stevensons")[3] argue that First American had no right to appeal the punitive damages award because it filed its post-verdict motion late. The Stevensons also argue that the award was reasonable in light of First American's bad faith conduct, and the harm that they might have suffered as a result of that bad faith. The Stevensons further contend that punitive damages were appropriate because First American's conduct needed to be deterred.

¶ 4 We conclude that the punitive damages award in this case was excessive and deprived First American of its right to due process. We therefore reverse the court of appeals'

---

[1] The Honorable D. Todd Ehlers presided.

[2] First American's petition for review addressed four issues. We granted review, however, solely on the issue of whether the punitive damages award was unconstitutionally excessive.

[3] The original plaintiffs in this action, Robert L. Kimble and Judith W. Kimble, assigned their rights under their title insurance policy, including any claims against First American, to the Stevensons as part of a settlement agreement.

decision and remand this case to the circuit court for entry of a judgment against First American in the amount of $239,738.49.

I. BACKGROUND FACTS

¶ 5 On October 26, 2004, Robert L. Kimble and Judith W. Kimble ("Kimbles") purchased a lakefront lot located in the Town of Nasewaupee in Door County ("Kimble Lot") from Dorene Dempster ("Dempster") and Mark Herrell ("Herrell").[4] A private cut-off road that crossed the property immediately to the west provided access to the Kimble Lot. That property was owned by Land Concepts, Inc. ("Land Concepts").

¶ 6 The deed executed by Dempster and Herrell conveying the Kimble Lot to the Kimbles warranted that the property was benefitted by two easements. One easement purported to grant the Kimble Lot use of a private driveway connecting it to County Highway M across property to the north ("North Easement"). That private driveway had not been used in many years at the time of the sale. The other easement purported to grant the Kimble Lot access to County Highway M across Land Concepts' property ("West Easement").[5] It is undisputed that the cut-off road was not within the boundaries of either of these easements.

¶ 7 On October 27, 2004, First American issued the Kimbles a title insurance policy for the Kimble Lot. The policy obligated First American to defend and indemnify the Kimbles for any covered loss, including losses resulting from "[u]nmarketability of the title" and "[l]ack of a right of access

---

[4] Dempster and Herrell had originally purchased the lot from the Stevensons. All were initially defendants in the Kimbles' lawsuit.

[5] The West Easement traversed property belonging only to Land Concepts, while the North Easement traversed property belonging to both Land Concepts and other owners.

to and from the land." The policy did not insure any specific route of access.

¶ 8 In early 2008, the Kimbles listed their property for sale with a real estate agent.[6] On March 5, 2008, the Kimbles' agent received a letter from Land Concepts stating that the Kimbles "do not own—and cannot convey—any access rights to County Highway M" from the Kimble Lot. The letter instructed the agent to make prospective purchasers of the Kimble Lot aware of lack of access rights "[i]n order to avoid possible future misunderstandings and/or confusion." On March 17, 2008, the Kimbles' attorney contacted the Kimbles' local insurance agent, Marilyn DeNamur ("DeNamur"), about the dispute. DeNamur forwarded the matter to Donald Schenker ("Schenker"), an assistant vice president at First American.

¶ 9 On March 18, 2008, DeNamur provided Schenker with the deeds and other recorded documents purportedly granting the North and West Easements to the Kimbles' predecessors in title. In a follow-up message to Schenker on March 28, DeNamur noted that there appeared to be a problem with the deeds purporting to grant and convey the North Easement. DeNamur asked Schenker whether she should "continue to dig for more documentation?" Schenker never asked for more research.[7]

¶ 10 On March 31, 2008, Schenker, on behalf of First American, sent the Kimbles a letter which addressed the access issue. Schenker indicated in his letter that he believed the West Easement was defective.[8] Schenker asserted, however, that the

---

[6] The precise date of the real estate listing is not a part of the record.

[7] The record is devoid of any direct response from Schenker to DeNamur's March 28, 2008 e-mail message.

[8] Specifically, Schenker wrote that the document recording the easement failed to identify the property benefitted, and thus failed to comply with Wis. Stat.§ 706.02(1) (2009-10). All subsequent

North Easement continued to provide the Kimble Lot access to the highway, and because the title remained as insured, First American had no duty to intervene in the dispute. In his letter, Schenker described the chain of title he claimed supported the North Easement, but made no mention of the problems identified by DeNamur.

¶ 11 On May 27, 2008, the Kimbles forwarded Schenker a copy of a letter they intended to send to Land Concepts asserting their right to use the cut-off road. The Kimbles asked Schenker whether the letter jeopardized their title insurance policy. On May 28, 2008, Schenker assured the Kimbles that it did not, again implicitly asserting that another right of access existed.

¶ 12 On June 13, 2008, the Kimbles received a response letter from Land Concepts, wherein Land Concepts threatened to "close the access over [its] property" if the dispute was not "promptly resolved." On June 18, 2008, the Kimbles contacted Schenker regarding the threatened closure. The Kimbles asked Schenker whether First American would insure the North Easement under the title policy if the Kimbles constructed a new driveway following the route of that easement.

¶ 13 On June 25, 2008, Schenker reiterated to the Kimbles that their title policy did not insure any particular route of access. Schenker again asserted that the North Easement provided access and stated, "[w]hether there is some legal defense to prevent the Kimbles from using it, which falls under some exclusion or exception in the policy, we do not know." Schenker further recommended that the Kimbles have a survey of the North Easement performed before constructing any driveway.

¶ 14 The Kimbles continued to market their property throughout 2008, relying on Schenker's assurances that it had good access to the highway. Land Concepts continued to

---

references to the Wisconsin Statutes are to the 2009-10 version unless otherwise indicated.

dispute the Kimbles' right of access, but did not follow through on its threat to physically close the cut-off road.

¶ 15 On January 12, 2009, the Kimbles received a cash offer to purchase their property. The sale was made contingent on the access issue being resolved. Despite an extension on the original 30-day time limit, the Kimbles were unable to negotiate a resolution with Land Concepts and lost the sale.

II. PROCEDURAL POSTURE

¶ 16 On June 3, 2009, the Kimbles filed suit against Land Concepts and the Stevensons. The Kimbles sought a declaration that the North Easement was valid and sought a prescriptive easement for their use of the cut-off road. The Kimbles also claimed that Land Concepts, in recording the West Easement, had slandered the title to the Kimbles' property.

¶ 17 On October 23, 2009, the Kimbles amended their complaint adding breach of warranty claims against Dempster, Herrell, and the Stevensons, and a breach of contract claim against First American for failing to defend the title to their property.

¶ 18 On July 21, 2010, the Kimbles settled their claims against all the defendants except First American. As part of the settlement, the Kimbles and the Stevensons paid Land Concepts $40,000 to secure an easement over the route of the existing cut-off road. The Stevensons paid an additional $10,000 to the Kimbles for an assignment of the Kimbles' rights under the title insurance policy, including any claims against First American.

¶ 19 On August 6, 2010, the Stevensons filed a cross-claim against First American, alleging breach of contract and breach of fiduciary duty and bad faith in First American's refusal to defend the title to the Kimble Lot.

¶ 20 On December 1, 2010, First American filed a motion for declaratory and summary judgment, asking the court to

dismiss the Stevensons' cross-claim. First American argued that the Stevensons were not "insureds," and thus had no rights under the title policy. First American also contended that the Kimbles were not permitted to settle their claims against other defendants without the written consent of First American. First American asserted that the title policy was void as a result.

¶ 21 The Stevensons argued that the Kimbles were permitted to assign their rights under the title policy, and that the partial settlement was proper under the terms of the insurance contract. The Stevensons also asserted that, to the extent summary judgment was warranted, it should be granted against First American on the Stevensons' breach of contract claim.

¶ 22 On January 18, 2011, the circuit court denied First American's motion for declaratory and summary judgment. The court concluded that the assignment of rights from the Kimbles to the Stevensons was proper and that there were issues of fact to be tried regarding the Stevensons' breach of contract and breach of fiduciary duty and bad faith claims.

¶ 23 On February 4, 2011, the Stevensons filed a motion in limine which asked the court to exclude any evidence of the monetary terms of the settlement agreements between the Kimbles and the other defendants.

¶ 24 On February 21, 2011, First American filed a motion in limine asking the court to exclude evidence that the Kimbles' title was unmarketable as a result of the access problems. First American argued that, while the access issues might have impaired the value of the property, they did not constitute a defect in the title.

¶ 25 On March 1, 2011, the circuit court granted the Stevensons' motion in limine to exclude evidence of the terms of the settlement between the Kimbles and the other defendants. Additionally, the circuit court denied First American's motion in limine to exclude evidence of unmarketability. In denying First American's motion, the court determined that the issue of marketability was a legal question

to be determined by the court prior to trial. The court concluded that title to the Kimble Lot was rendered unmarketable by the access dispute. As a result, the court concluded that coverage was triggered under the title insurance policy. The court determined that it was for the jury to decide whether First American's decision not to defend the Kimbles under the policy constituted breach of contract and breach of fiduciary duty and bad faith.

¶ 26 On March 2, 2011, the jury trial began. At trial, the Stevensons presented evidence that First American was obligated to defend the Kimbles' title and failed to do so. The Stevensons further presented evidence that First American knew the North Easement was defective and concealed that information from the Kimbles. First American presented evidence that it had a good faith belief that the North Easement provided access, and that as a result, its failure to disclose the defect to the Kimbles was merely a mistake.[9]

¶ 27 On March 3, 2011, the jury returned a verdict in favor of the Stevensons. The jury found that First American breached its contract and exercised bad faith in refusing to defend the Kimbles' title. The jury awarded the Stevensons $50,000 in compensatory damages for the breach of contract, and $1,000,000 in punitive damages to punish First American's bad faith.

¶ 28 On March 24, 2011, First American filed three motions after the verdict with the circuit court.[10] Initially, First

---

[9] As we have granted review only on the legal issue of whether the punitive damages award in this case was excessive, this opinion does not provide a detailed description of the arguments presented at trial. The evidence in the record is assumed to be sufficient to support the jury's findings in all respects except the size of the punitive damages award.

[10] The Stevensons argue that First American waived its right to appeal the punitive damages award by filing its post-verdict motions late. *See* Wis. Stat. § 805.16(1). We address this argument in part IV(A) of this opinion.

American asked the court, pursuant to Wis. Stat. § 805.14 (5) (c), to reduce the compensatory damages award. Next, First American asked the court to change the jury's answer to the bad faith question to "no" and delete the jury's punitive damages award. First American asserted that there was insufficient evidence supporting the findings. Finally, First American asked the court, in the alternative, to set aside the punitive damages award, which First American argued was excessive, and order a new trial on damages.

¶ 29 The Stevensons opposed First American's post-verdict motions. The Stevensons argued that the jury's award was appropriate, and that First American's conduct justified punitive damages. Further, the Stevensons argued that the jury's punitive damages award was not excessive.

¶ 30 On June 14, 2011, the circuit court granted First American's motion regarding the compensatory damages award, reducing it to $29,738.49. The court denied First American's other motions, however, allowing the bad faith finding and the punitive damages award to stand. The court then entered judgment against First American in the amount of $1,029,738.49.

¶ 31 On June 29, 2011, First American filed its notice of appeal. On July 11, 2011, First American filed a motion with the circuit court requesting the court stay the effect of the judgment pending appeal. On August 3, 2011, the circuit court granted First American's motion.

¶ 32 Before the court of appeals, First American made four arguments. First, it argued that the Kimbles were not permitted to assign their rights under the title insurance policy to the Stevensons. Second, First American argued that the circuit court improperly determined that coverage under the policy was invoked prior to trial. Third, First American argued that there was insufficient evidence to support the jury's

finding of bad faith. Finally, First American argued that the punitive damages award was excessive.[11]

¶ 33 The Stevensons argued that the Kimbles' assignment of their rights under the insurance policy was valid, and that the circuit court properly found coverage under the title policy as a matter of law. The Stevensons also contended that First American's conduct supported the jury's finding of bad faith, and that the punitive damages award was not excessive.

¶ 34 On October 11, 2012, the court of appeals affirmed the circuit court. *Kimble*, No. 2011AP1514, slip op., ¶1. First, the court of appeals concluded that the Kimbles were permitted to assign their rights under the title policy to the Stevensons, and that they had not violated the terms of the policy in agreeing to a partial settlement. *Id*., ¶¶16-17. Second, the court of appeals affirmed the circuit court's determination that, as a matter of law, there was coverage under the title policy. Id., ¶¶24-28. Third, the court appeals affirmed the circuit court's determination that the jury's finding of bad faith was supported by sufficient evidence. *Id*., ¶¶33-35. Finally, the court of appeals summarily affirmed the jury's punitive damages award, finding First American's argument regarding excessiveness of the award to be "insufficiently developed." *Id*., ¶41.[12]

---

[11] First American also argued that the compensatory damages award should be further reduced. Because this argument was not raised in First American's post-verdict motion, however, the court of appeals declined to address the issue. *Kimble v. Land Concepts, Inc*., No. 2011AP1514, unpublished slip op., ¶ 37 (Wis. Ct. App. Oct. 11, 2012) (citing *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983)).

[12] Given that the availability of "'meaningful and adequate review by the trial court' and subsequent appellate review" of punitive damages awards is necessary to ensure that such awards are not imposed in an arbitrary manner, *see Honda Motor Co., Ltd. v. Oberg*, 512 U .S. 415, 420 (1994), the court of appeals' lack of analysis is remarkable. We take this opportunity to remind courts, both trial and appellate, of their obligation to ensure that

¶ 35 On December 28, 2012, First American petitioned this court for review, which we granted on July 18, 2013.[13]

¶ 36 On September 3, 2013, the Stevensons filed a motion for summary disposition in this court, arguing that by filing its post-verdict motion late, First American had waived its right to appellate review. *See* Wis. Stat.§§ 805.14(5) and 805.15(1). We held the motion in abeyance.[14]

III. STANDARD OF REVIEW

¶ 37 "[T]he constitutional issue of punitive damages merits de novo review." *Trinity Evangelical Lutheran Church & Sch.-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶47, 261 Wis. 2d 333, 661 N.W.2d 789 (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc*., 532 U.S. 424, 431 (2001)). "[I]n determining whether a jury's award [is] excessive, . . . the reviewing court properly review[s] the entire record 'ab inito' . . . ." *Id*., ¶48 (citing *Mgmt. Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 192 n.32, 557 N.W.2d 67 (1996)).

¶ 38 We recognize that our prior case law, particularly *Jacque v. Steenberg Homes, Inc*., 209 Wis. 2d 605, 563 N.W.2d 154 (1997), has created confusion with respect to the standard of review in punitive damages cases. *Jacque*,

---

punitive damages awards comply with due process.

[13] Because we granted review solely on the issue of whether the punitive damages award was excessive, this opinion assumes, without deciding, that the assignment was valid, that there was coverage under the insurance policy, and that the jury's finding of bad faith was supported by the evidence.

[14] In response to the Stevensons' motion for summary disposition, First American filed a motion to supplement the record, purporting to show that its post-verdict motion was filed timely, and a motion to strike the Stevensons' reply brief on the motion for summary disposition. The motion for summary disposition, as well as these additional motions are rendered moot by our decision and thus are not addressed.

however, predates both *Cooper*, wherein the United States Supreme Court clarified that de novo is the appropriate standard of review, and *Trinity*, wherein this court explicitly adopted that standard. While judges "serve as gatekeepers before sending a question on punitive damages to the jury," *Strenke v. Hogner*, 2005 WI 25, ¶40, 279 Wis. 2d 52, 694 N.W.2d 296,[15] once the issue of punitive damages is properly before the jury, its decision to award punitive damages is accorded deference. The size of the award, however, is subject to de novo review to ensure it accords with the constitutional limits of due process. *Trinity*, 261 Wis. 2d 333, ¶¶47-49.

IV. ANALYSIS

A. Post-Verdict Motion

¶ 39 As an initial matter we address the argument, raised by the Stevensons in their motion for summary disposition, that First American lost its right to appeal the punitive damages award when it failed to timely file its post-verdict motion under Wis. Stat.§ 805.16(1).

¶ 40 Wisconsin Stat.§ 805.16(1) provides that "[m]otions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents." Further, a litigant's failure to comply with the statute causes "the circuit court [to] 'los[e] competency to exercise its jurisdiction.'" *Hartford Ins. Co. v. Wales*, 138 Wis. 2d 508,

---

[15] *Strenke v. Hogner* interpreted Wis. Stat. § 895.85(3) (2001-02), the predecessor to the current punitive damages statute. 2005 WI 25,¶2, 279 Wis. 2d 52, 694 N.W.2d 296; *see also* Wis. Stat. § 895.043(3).

513, 406 N.W.2d 426 (1987) (quoting *Jos. P. Jansen v. Milwaukee Area Dist. Bd.*, 105 Wis. 2d 1, 10, 312 N.W.2d 813 (1981)).

¶ 41 The circuit court's inability to consider a post-verdict motion, however, does not deprive this court of appellate jurisdiction. Failure to comply with Wis. Stat. § 805.16 "limit[s] the issues that may be asserted as a matter of right on the appeal . . . ." *Wales*, 138 Wis. 2d at 510-511. "A trial court's failure to conform with sec. 805.16, Stats., however, does not strip this court of its discretionary power[]" to review the case. *Brandner v. Allstate Ins. Co.*, 181 Wis. 2d 1058, 1071, 512 N.W.2d 753 (1994).

¶ 42 The merits issue in this case is of constitutional dimension and has been fully briefed and argued by both parties. We therefore exercise our discretion and address whether the punitive damages award against First American was unconstitutionally excessive.

B. Punitive Damages Award

¶ 43 Punitive damages are not intended to compensate the plaintiff, but rather are awarded "to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct." *Trinity*, 261 Wis. 2d 333, ¶50. "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).[16]

---

[16] Because punitive damages serve the State's interests, rather than serving to compensate a party, punitive damages awards do not implicate a plaintiff's right to a remedy or to a jury trial. *See* Wis. Const. art. I, §§ 5 and 9; *compare Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 69, 284 Wis. 2d 573, 701 N.W.2d 440 (suggesting that a statutory cap on noneconomic compensatory damages might implicate a plaintiff's right to a jury trial and to a remedy under the Wisconsin Constitution).

¶ 44 In Wisconsin, punitive damages are authorized by statute, *see* Wis. Stat. § 895.043, and may be awarded "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Wis. Stat. § 895.043(3). The judge has the duty to act as the "gatekeeper" when determining whether the issue of punitive damages is properly before the jury. *Strenke*, 279 Wis. 2d 52, ¶40. Once the judge has determined that the issue of punitive damages is properly before the jury, whether to actually award punitive damages "in a particular case is entirely within the discretion of the jury." *Jacque*, 209 Wis. 2d at 626. Both the judicial determination regarding whether punitive damages is a proper jury question and the size of the jury's punitive damages award are subject to review. The Due Process Clause of the Fourteenth Amendment "imposes substantive limits on the size of a punitive damages award." *Trinity*, 261 Wis. 2d 333, ¶49 (citing *Mgmt. Computer Servs*., 206 Wis. 2d at 193).[17]

¶ 45 A punitive damages award "is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages, or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing." *Trinity*, 261 Wis. 2d 333, ¶50. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only

---

[17] We have previously stated that "the evidence must be viewed in the light most favorable to the plaintiff, and a jury's punitive damages award will not be disturbed, unless the verdict is so clearly excessive as to indicate passion and prejudice." *Trinity*, 261 Wis. 2d 333,¶56; *Jacque*, 209 Wis. 2d at 626-27. Given that punitive damages awards mandate de novo review, *see Trinity*, 261 Wis. 2d 333, ¶47, this language should not be read to require deference to the amount of the jury's award. Rather, stating that an award is "so clearly excessive as to indicate passion and prejudice" is simply another way of referring to an award that violates due process.

of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574; *see also Trinity*, 261 Wis. 2d 333, ¶51.

¶ 46 The United States Supreme Court has applied a three-part test to determine whether an award of punitive damages is excessive. *See BMW*, 517 U.S. at 574-75; *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This test asks the reviewing court to weigh: "(1) the degree of egregiousness or reprehensibility of the conduct; (2) the disparity between the harm or the potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct." *Trinity*, 261 Wis. 2d 333, ¶52 (citing *BMW*, 517 U.S. at 575).

¶ 47 Wisconsin case law calls on courts to apply a substantively identical test applying six factors rather than three:

1. The grievousness of the acts;

2. The degree of malicious intent;

3. Whether the award bears a reasonable relationship to the award of compensatory damages;

4. The potential damage that might have been caused by the acts;

5. The ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; and

6. The wealth of the wrongdoer.

Trinity, 261 Wis. 2d 333, ¶53; *Mgmt. Computer Servs.*, 206 Wis. 2d at 194. Wisconsin courts are called upon to analyze only "those factors which are most relevant to the case, in order

to determine whether a punitive damages award is excessive."[18] *Id*.

1. Reprehensibility

¶48 "'[T]he most important indicium of the reasonableness of a punitive damage[s] award is the degree of reprehensibility of the defendant's conduct.'" *Trinity*, 261 Wis. 2d 333, ¶57 (quoting *Jacque*, 209 Wis. 2d at 628). "This principle reflects the accepted view that some wrongs are more blameworthy than others." *BMW*, 517 U.S. at 575.

¶ 49 In *Campbell*, the Supreme Court explained the standard courts should apply in determining the reprehensibility of a defendant's conduct:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

538 U.S. at 419 (citation omitted); *see also BMW*, 517 U.S . at 576-77.

---

[18] While Wisconsin courts are free to apply these six factors flexibly, based upon their relevancy to a given case, they should be analyzed in conjunction with the three constitutional "guideposts" described by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). The factors are not intended to supplant the test mandated by the Constitution.

¶ 50 Turning to the case at issue, we must acknowledge that First American's conduct in the case at issue is reprehensible. First American knew that the North Easement did not provide access to the Kimble Lot and that there was no reasonable alternative access point, and yet refused to honor its obligation to assist the Kimbles in defending their title. First American further withheld the information it had in its possession from the Kimbles, causing them to waste valuable time and resources. These circumstances support an award of punitive damages.[19] The question, however, is whether the *degree* of reprehensibility supports the punitive damages actually awarded.

¶ 51 In that regard, it is noteworthy that none of the reprehensibility factors identified by the Supreme Court in *Campbell* are present in this case. The damage suffered by the Kimbles was indisputably economic, not physical. First American's bad faith did not endanger the health or safety of any person. There is no indication in the record that the Kimbles were financially vulnerable.[20] The conduct complained of was an isolated incident. And while First American's conduct indisputably involved deception, there is no indication of intentional malice on the part of the company or its employees. The punitive damages award against First American is therefore suspect. *Campbell*, 538 U.S. at 419.

¶ 52 Further, the degree of reprehensibility in this case falls short of that found in prior Wisconsin cases supporting substantial punitive damages awards.

---

[19] The failure of an insurer to diligently investigate before denying a claim and concealing material information from an insured clearly meet this standard. *See, e.g., Trinity*, 261 Wis. 2d 333,¶62.

[20] While Judith Kimble testified at trial that a dire financial situation faced by her elderly parents caused the Kimbles to reduce their asking price and be "more aggressive" in selling their home, the record does not contain any indication that the Kimbles themselves were in any financial trouble.

¶ 53 For example, in *Trinity*, the insurance company defendant denied a claim based on an omission in coverage, despite knowing that the omission in the policy was the result of its own error. 261 Wis. 2d 333, ¶¶7-8. This court held that the insurance carrier not only "engaged in prohibited conduct while knowing or recklessly disregarding the lack of a reasonable basis for denying the claim," but further was a recidivist, having previously been the subject of a lawsuit involving precisely the same kind of conduct. *Id*.,¶¶57-59. These facts allowed the defendant to be subjected to a more severe punitive damages award without offending due process: $3,500,000 in a case where only $490,000 in harm or potential harm had been established.[21] *Id*.

¶ 54 Here, there is no indication from the record that First American engaged in repeated conduct. Neither does the record support any finding of malicious intent. First American's conduct, while "sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award." *BMW*, 517 U.S. at 580.

2. Disparity

¶ 55 "When compensatory damages are awarded, the reviewing court is to consider whether the [punitive damages] award bears a reasonable relationship to the award of compensatory damages." *Trinity*, 261 Wis. 2d 333, ¶63. "Wisconsin law expressly rejects the use of a fixed multiplier, either a fixed ratio of compensatory to punitive damages or of civil or criminal penalties to punitive damages, to calculate the

---

[21] "'[O]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.'" *Trinity*, 261 Wis. 2d 333, ¶58 (quoting *Campbell*, 538 U.S. at 423).

amount of reasonable punitive damages." *Id*. (citations omitted). "However, we have held that in the appropriate case, a comparison of the compensatory damages and the punitive damages award is important." Id. (citing *Jacque*, 209 Wis. 2d at 629).

¶ 56 In the case at issue, the compensatory damages ultimately awarded were $29,738.49. Using the compensatory damages award as a baseline thus represents a ratio of approximately 33:1. Such a ratio is transparently problematic under the United States Constitution.

¶ 57 The Supreme Court, however, has declared that reviewing courts can consider not only the compensatory damages award, but also "'the harm likely to result from the defendant's conduct.'" *BMW*, 517 U.S. at 581 (quoting *TXO Prod. Corp. v. Alliance Res. Corp*., 509 U.S. 443, 460 (1993)). Similarly, where it is relevant and appropriate, our prior case law supports consideration of "potential damage" that might have been caused by a defendant's acts. *Trinity*, 261 Wis. 2d 333, ¶53.

¶ 58 The Stevensons argue that the appropriate figure to use in assessing the disparity, in light of the sale the Kimbles lost during the dispute, is the full $1,300,000 sale price of the Kimbles' home. We disagree. The Stevensons can point to no indication in the record that the full value of the Kimbles' property was ever in danger.[22] Case law does not support this type of speculative "potential damage," particularly where it is unsupported by the record.

¶ 59 For example, in *TXO*, the petitioner fraudulently attempted to undermine the title to a tract of land in order to avoid paying royalties for oil and gas extraction. 509 U.S. at

---

[22] On December 26, 2013, the Stevensons filed a motion to supplement the record by judicial notice, asking this court to take into account the eventual sale price of the Kimbles' home. We deny that motion. The supplemental information was not part of the record before the trial court.

448-50. The respondent received a judgment for common law slander of title in its favor, including $19,000 in compensatory damages and $10,000,000 in punitive damages. *Id*. at 453. Petitioner appealed, arguing that the 526:1 ratio of compensatory to punitive damages rendered the award unconstitutionally excessive. *Id*. A plurality of the Supreme Court held that, in addition to the compensatory damages award, it was appropriate to consider the "between $5 million and $8.3 million" in lost royalties that the respondent would have suffered had petitioner's plan succeeded. *Id*. at 460-61.

¶ 60 Similarly, in *Trinity*, this court accepted that the appropriate figure for comparison was not the $17,000 compensatory damages award, but rather was the $490,000 in potential damages at risk in the underlying negligence suit.

¶ 61 Notably, the "potential harm" in both of these cases is grounded in record and is not merely speculative. Had the plaintiff in *Trinity* lost its case, $490,000 was the amount it would have had to pay. Had the petitioner's scheme in TXO succeeded, it was undisputed that the respondent would have been deprived of millions of dollars in royalties. These analyses were firmly rooted in fact, and the amounts in question were derived from the record.

¶ 62 Here, the Stevensons invite this court to depart from the facts of the record and speculate that, had the Kimbles failed to discover First American's bad faith, they would have been completely unable to sell their property, rendering it valueless. We decline this invitation. Many factors enter into a completed sale of real estate, and to attribute full responsibility for the lost sale to First American is highly speculative. There is no clear indication in the record of what impact the access dispute had on the value of the Kimbles' property.

¶ 63 We share Justice Kennedy's concern that, without a meaningful standard, a court can end up "relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the

Constitution." *TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring).

¶ 64 Fortunately, there is no need to speculate about potential harm, or to rely on subjective reactions, in order to appropriately assess the disparity in this case. The record reveals that the Kimbles spent $40,000 to purchase the access to their property that their title policy was supposed to insure.[23] Given that the compensatory damages award merely accounted for legal expenses, it is appropriate to add the compensatory damages together with the cost of purchasing the access for purposes of assessing the disparity of the punitive damages award. This $69,738.49 figure, however, still represents a problematic ratio of approximately 14:1.

¶ 65 "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. Even a punitive damages award of just four times compensatory damages can come "'close to the line'" of violating due process. *BMW*, 517 U.S. at 581 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)).[24]

¶ 66 In the case at issue, there are no special circumstances calling for a high ratio punitive damages award. This becomes especially apparent when the conduct here is compared to other cases where courts have upheld high ratio awards. *See*, *e.g.*,

---

[23] Although this evidence was not before the jury at trial, it was before the circuit court and was made a part of the record on appeal. We may, therefore, properly consider it in "review[ing] the entire record 'ab inito' . . . ." *Trinity*, 261 Wis. 2d 333, ¶48.

[24] Additionally, the Wisconsin Legislature recently enacted a law limiting punitive damages awards. *See* 2011 Wis. Act 2 § 23m. The new statute caps punitive damage awards at a 2:1 ratio of compensatory damages or $200,000, whichever is greater. Wis. Stat. § 895.043(6) (2011-12). While the statute is not applicable to this case, it is nonetheless appropriate to consider the legislature's judgment of a reasonable disparity of punitive to compensatory damages.

Trinity, 261 Wis. 2d 333; *J.K. v. Peters*, 2011 WI App 149, 337 Wis. 2d 504, 808 N.W.2d 141 (upholding a high ratio punitive damages award against a social worker who sexually assaulted his minor client); *Strenke v. Hogner*, 2005 WI App 194, 287 Wis. 2d 135, 704 N.W.2d 309 (upholding a high ratio punitive damages award against a drunk driver who caused substantial injuries to another motorist).[25] These prior cases involve the kind of especially egregious conduct identified by the Supreme Court in *Campbell*, including "physical as opposed to economic" harm, and "indifference to or a reckless disregard of the health or safety of others." 538 U.S. at 419. As we have discussed, the case at issue does not involve such conduct.

¶ 67 In sum, the award in this case does not bear a "reasonable relationship" to either the compensatory damages award or the potential harm faced by the Kimbles. We conclude, therefore, that the award does not comport with due process.

3. Civil or Criminal Penalties

¶ 68 Finally, "we engage in a comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Trinity*, 261 Wis. 2d 333, ¶66 (citing *Jacque*, 209 Wis. 2d at 630). In this case, as in *Trinity*, First American could be subject to a criminal penalty, including a fine of up to $10,000, for the violation of "any insurance statute or rule of this state." Wis. Stat. § 601.64(4). The Stevensons argue that First American violated Wis. Admin. Code § Ins. 6.11(3)(a), which prohibits unfair settlement practices.

---

[25] The court of appeals upheld the damages award in *Strenke* on remand from this court. This court was equally divided on the question of whether the award of punitive damages was excessive. *See Strenke*, 279 Wis. 2d 52, ¶58.

¶ 69 In this case we conclude, as we did in *Trinity*, that "a criminal penalty has 'less utility' when used to determine the dollar amount of the punitive damages award." 261 Wis. 2d 333, ¶68 (citing *Campbell*, 538 U.S. at 428). We nonetheless note that "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." *Id*., ¶66 (quoting *Campbell*, 538 U.S. at 428).

4. Application

¶ 70 Applying the relevant factors to the case at issue, we conclude that the punitive damages award against First American is excessive. First, First American's conduct "is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award." *BMW*, 517 U.S. at 580. Second, there is no especially egregious conduct supporting a high ratio punitive damages award. Absent such egregious conduct, even the 7:1 ratio imposed in *Trinity* would be unconstitutionally excessive. Finally, the existence of an additional civil or criminal penalty has "limited utility" in determining the reasonableness of the punitive damages award.[26] *See Trinity*, 261 Wis. 2d 333, ¶68.

¶ 71 We conclude, in consideration of the case law, that the appropriate amount of punitive damages in this case is

---

[26] We note here, as we did in *Trinity* that "[t]he factors discussed are the ones most relevant in this case . . . [and] there are other factors that may be relevant given the nature of the case at hand." 261 Wis. 2d 333, ¶69. In particular, we note that while the "[d]efendant's wealth is oftentimes a significant factor," *id*., it is not significant in this case. The record indicates First American would likely be able to pay the amount specified by the jury. Standing alone, however, the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) (citing *BMW*, 517 U.S. at 585).

$210,000. Comparing the amount of this award to the $69,738.49 amount of compensatory and potential damages results in a ratio of approximately 3:1, below the ratio we upheld in *Trinity*, and just below the constitutional "line" mentioned by the Supreme Court in *BMW*, 517 U.S. at 581, and *Haslip*, 499 U.S. at 23. Because "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," *Campbell*, 538 U.S. at 425, we conclude that this amount effectively punishes First American's misconduct, while acknowledging that its conduct did not rise to level of egregiousness found in prior punitive damages cases.

V. CONCLUSION

¶ 72 We conclude that the punitive damages award in this case was excessive and deprived First American of its right to due process. We therefore reverse the court of appeals' decision and remand this case to the circuit court for entry of judgment against First American in the amount of $239,738.49.

By the Court. – The decision of the court of appeals is reversed, and the cause is remanded to the circuit court.

¶ 73 DAVID T. PROSSER, J., did not participate.

¶ 74 SHIRLEY S. ABRAHAMSON, C.J. (*dissenting*). The majority opinion reaches a shocking result: It makes First American's wrongdoing an efficient way of doing business. For all its reprehensible conduct, First American in fact pays less by acting in bad faith and wrongfully refusing to pay the Kimbles' claim than it would have paid had it honored the claim in good faith after discovering its error. Under the majority opinion, the combined punitive and compensatory damages amount to $239,738.49—a sum smaller than the title insurance policy limit of $370,000. This result directly

contravenes the entire purpose of punitive damages—making wrongdoers pay and deterring future wrongful conduct.

¶ 75 *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Insurance Co.*, 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789, is the leading case for determining whether punitive damages are unconstitutionally excessive as a violation of due process. The majority opinion dutifully recites the *Trinity* factors.[1] Yet the majority opinion jettisons *Trinity*, turning the test on its head in favor of the reasoning set forth in *Trinity*'s dissent.

¶ 76 The majority opinion achieves a result in which the wrongdoer was enriched by its wrongdoing. This result, in my opinion, cannot stand.

¶ 77 The test in *Trinity* applies six factors to assess whether a punitive damages amount is justified:

> 1. The grievousness of the acts;
> 2. The degree of malicious intent;
> 3. Whether the award bears a reasonable relationship to the award of compensatory damages;
> 4. The potential damage that might have been caused by the acts;
> 5. The ratio of the award to civil or criminal penalties that could be imposed for comparable conduct; and
> 6. The wealth of the wrongdoer.

Majority op., ¶48; *Trinity*, 261 Wis. 2d 333, ¶53.

¶78 It is perverse not to apply the *Trinity* test to the instant case. The instant case is on all fours with *Trinity*. In both cases an insurance company refused to pay the insured's claim (breach of contract); the court found that the insurance company breached the insurance contract; the insurance company was found to have acted in bad faith; and the

---

[1] Majority op., ¶ 48.

fact-finder found that the misconduct justified a punitive damage award.[2]

¶ 79 In *Trinity*, the court held that due process was satisfied by a punitive damages amount of $3,500,000 based on a potential harm of $490,000, a 7:1 ratio.

¶ 80 Because the majority opinion fails to apply *Trinity* properly, I dissent.

---

[2] Here are the facts of *Trinity*: An employee of Trinity Church, the insured, was in a motor vehicle accident, and Trinity Church was liable for damages of $490,000.

An agent of Tower Insurance erred by not providing Trinity Church the coverage that Trinity Church requested.

Tower Insurance refused to reform the policy to cover Trinity Church (as the law required it to do) and to pay $490,000 on behalf of Trinity Church. Trinity Church sued Tower Insurance for breach of contract, bad faith, and punitive damages.

Tower Insurance paid $490,000 on Trinity Church's behalf.

The *Trinity* court used the $490,000 figure as harm to Trinity Church to calculate the punitive damages. Had Tower Insurance's misconduct not been discovered, Trinity Church would have had to pay the full $490,000 from its own funds; Tower Insurance would have received a net gain of $490,000. In calculating the harm to Trinity Church, the Trinity court did not take into account that Tower Insurance's agent might ultimately be responsible for paying the $490,000.

Here are the facts in the instant case: First American erred in not providing the Kimbles with their policy limits of $370,000 when First American discovered that the Kimbles' title was not marketable. Had First American's misconduct not been discovered, the Kimbles could not have sold their property, leaving them with a loss of both the $1.3 million sale price of the property and the $370,000 policy limits of the First American title insurance policy. First American would have received a net gain of $370,000.

I.

¶ 81 The first factor of the *Trinity* test is the grievousness of the acts. The insurance company's misconduct was substantially the same in *Trinity* and in the present case:

- In each case, an insurance company was sued by its insured (or someone standing in the insured's shoes);
- In each case, the insurance company had failed to pay the claim of its own insured;
- In each case, the insurance company was given repeated opportunities to pay the claim and refused to do so, despite knowing the facts justifying payment of the claim;
- In each case, the insurance company was found to have acted in bad faith; and
- In each case, a jury awarded over $1 million in punitive damages.

¶ 82 The *Trinity* court held that the insurance company's misconduct constituted a "continuing, egregious, and flagrant pattern of disregard toward [the insurance company's] duty owed to its insured," which justified the punitive damages in that case.[3]

¶ 83 The majority opinion in the present case characterizes First American's conduct as not as reprehensible as that of the insurance company in *Trinity*. Majority op., ¶¶53-55, 71.

¶ 84 The majority opinion's conclusion does not square with the facts of the two cases.

¶ 85 First, as in *Trinity*, the legislature has made the insurance company's misconduct a crime, demonstrating the public policy of this state regarding the misconduct's reprehensibility. *See* majority op., ¶69; *accord Trinity*, 261 Wis. 2d 333,¶57.

---

[3] *Trinity*, 261 Wis. 2d 333, ¶62.

¶ 86 Second, as in *Trinity*, First American's misconduct was repeated; First American was a recidivist.[4] In *Trinity*, the court noted that the insurance company's agent "made a series of decisions that illustrate bad faith" and chastised the insurance company's repeated misconduct and failure to investigate.[5]

¶ 87 The majority opinion erroneously states that First American's misconduct was "an isolated incident," and that "there is no indication from the record that First American engaged in repeated conduct." Majority op., ¶51. On the contrary, First American in the instant case demonstrates a pattern of repeated misconduct. After discovering its initial error, First American had many opportunities to remedy its misconduct and instead continued to act improperly:

- When the Kimbles first inquired about their road access, First American asserted that an easement gave them access, when it in fact knew that the easement granted to the Kimbles was invalid.[6]
- When the Kimbles inquired whether they could assert a claim to the easement, First American assured them that they had road access.[7]
- At trial, First American's agent admitted that it discovered the deed that rendered the Kimbles' easement

---

[4] Majority op., ¶53 n.20 (quoting *Trinity*, 261 Wis. 2d 333, ¶ 58: "'[O]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.'") (internal citation omitted).

[5] *Trinity*, 261 Wis. 2d 333, ¶60.

[6] Majority op.,¶9.

[7] Majority op., ¶10.

invalid, and chose never to inform the Kimbles about the deed.[8]

- At trial, First American's agent admitted that it deliberately failed to investigate the alleged title defect.[9]
- Each time the Kimbles inquired as to their access, First American insisted that the Kimbles could access the road, variously stating that the Kimbles could go across a 25-foot strip to which they had no access,[10] through a

---

[8] The trial yielded the following testimony:

> [KIMBLES' COUNSEL]: Now, at your—at your deposition, I asked you whether you made any mention of the Cofrin deed [which rendered the easement invalid] to [the Kimbles' agent] in March of 2008. Do you recall that?
> [FIRST AMERICAN'S AGENT]: Yes.
> [KIMBLES' COUNSEL]: And we talked about your letters that you sent back and forth with him, correct?
> [FIRST AMERICAN'S AGENT]: Yes.
> [KIMBLES' COUNSEL]: And you acknowledge that it's true that you never told [the Kimbles' agent] about the Cofrin deed at any time in any of your conversations or in any of your letters?
> [FIRST AMERICAN'S AGENT]: That is correct.

[9] At trial, an investigator employed by First American testified that she asked First American's agent whether she should investigate further. The investigator suggested problems with the validity of the deed, and asked, "What does all of this mean for us?" and "Do you want me to dig for more documentation?" The investigator testified that she never received a response.

[10] The access to the south depended on an easement across a 25-foot strip of property. First American testified at trial that "Land Concepts [which does not want to give access] owns the fee simple interest to the 25-foot strip."

wetland that was barred from road construction,[11] and confusingly, "by water."[12]

---

[11] *See* court of appeals brief of defendant-appellant at 21. The access to the south also needed to cross lands marked as wetlands. The trial record reflects the following exchange:

> [KIMBLES' COUNSEL]: And did you take the position that the [Kimbles] had a right of access to their property to the south?
> [FIRST AMERICAN'S AGENT]: Yes.
> [KIMBLES' COUNSEL]: Through an area of forest and wetlands, correct?
> [FIRST AMERICAN'S AGENT]: Yes.
> Yet, government regulations prohibited development on the forest and wetlands, as the defendant's agent testified:
> [KIMBLES' COUNSEL]: And you know from reading [the government official's] deposition that the area that you've described is defined as wetlands according to Door County Planning, right?
> [FIRST AMERICAN'S AGENT]: That's correct.
> [KIMBLES' COUNSEL]: And that, in fact, Door County Planning has indicated that that area could not be developed into any road or opened or cleared, true?
> [FIRST AMERICAN'S AGENT]: That is correct.

12 The trial record reflects the following exchange:

> [KIMBLES' COUNSEL]: Well, you recall testifying at that court trial regarding whether the company was, in fact, at that time on Tuesday going to assert that the Kimbles enjoyed a right of access by water. Do you recall that testimony?
> [FIRST AMERICAN'S AGENT]: It came up. I recall it coming up.

[12] The trial record reflects the following exchange:
[KIMBLES' COUNSEL]: Well, you recall testifying at that court trial regarding whether the company was, in fact, at that time on Tuesday going to assert that the Kimbles enjoyed a right of access

¶ 88 The majority opinion maintains that the repeated misconduct here is less reprehensible than the repeated misconduct in *Trinity* because the insurance company in *Trinity* had committed similar misconduct in another case 30 years previously. Majority op., ¶53.

¶ 89 Yet the key factor for the reprehensibility of the insurance company's misconduct in *Trinity* was not that a 30-year-old prior court case existed or that the insurance company knew about it, but rather that the insurance company's "decisions, acts, and omissions . . . illustrate a continuing, egregious, and flagrant pattern of disregard toward [the insurance company's] duty owed to its insured . . . ." *Trinity*, 261 Wis. 2d 333, ¶62.

¶ 90 The record in the present case demonstrates that First American exhibited a similar continuing, egregious, and flagrant pattern of misconduct.

II.

¶ 91 The second factor is whether there was "intentional malice."

¶ 92 The majority opinion in the present case states that "there is no indication of intentional malice on the part of the First American or its employees." Majority op., ¶52. Similarly, the *Trinity* court concluded that there was no indication of intentional malice in that case either. Indeed *Trinity* does not require malice in order for punitive damages to be awarded. Rather, *Trinity* justified the amount of the punitive damages award on the insurance company's "intentional disregard of its duty to investigate diligently to ascertain and evaluate the facts and circumstances . . . ." *Trinity*, 261 Wis. 2d 333, ¶59.

¶ 93 The jury in the instant case found sufficient grounds to justify a finding that punitive damages should be awarded,

---

by water. Do you recall that testimony?
[FIRST AMERICAN'S AGENT]: It came up. I recall it coming up.

based on the evidence presented and the jury instructions. The jury instructions stated that the jury should award punitive damages if it found that "the defendant acted maliciously toward the plaintiff or in an intentional disregard for the rights of the plaintiff."[13] With a $1 million jury award of punitive

---

[13] Wis JI—Civil 1707.1, which was given to the jury, reads in relevant part:

> Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.
> A person's acts are malicious when they are the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended.
> A person acts in an intentional disregard of the rights of the plaintiff if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. Before you can find an intentional disregard of the rights of the plaintiff, you must be satisfied that the defendant's act or course of conduct was:
>
> (1) deliberate;
>
> (2) an actual disregard of the plaintiff's right to safety, health, or life, a property right, or some other right; and
>
> (3) sufficiently aggravated to warrant punishment by punitive damages.
> ....
>
> Factors you should consider in answering Question No. 6 [awarding the amount of punitive damages] include:
>
> 1. the grievousness of the defendant's acts,
>
> 2. the degree of malice involved,

damages, the jury found the "high degree of culpability" that could justify a punitive damages award.[14] Credible evidence supports the jury's finding of either malicious intent or intentional disregard of the rights of the insured. The majority opinion does not state that the evidence was insufficient for the jury to make such a finding. The jury finding is sufficient to satisfy *Trinity*.

III.

¶ 94 The *Trinity* test's third factor (ratio of compensatory damages to punitive damages) and fourth factor (potential damage to the plaintiff) are linked.

¶ 95 *Trinity* examined the ratio between potential harm and punitive damages to determine the appropriateness of the award. *Trinity*, 261 Wis. 2d 333, ¶65. "Wisconsin law expressly rejects the use of a fixed multiplier . . . ." *Trinity*, 261 Wis. 2d 333, ¶63.

¶ 96 Despite the lack of a fixed multiplier, *Trinity* provides a benchmark for the court. If a 7:1 ratio of punitive damages to potential harm ($3,500,000 punitive; $450,000 potential harm) and a 200:1 ratio of punitive damages to actual damages ($3,500,000 punitive; $17,570 actual damages) were permissible in *Trinity*, the instant case, so similar in facts, also supports an identical or similar ratio.

> 3. the potential damage which might have been done by such acts as well as the actual damage, and
>
> 4. the defendant's ability to pay. You may consider the defendant's wealth in determining what sum of punitive damages will be enough to punish the defendant and deter the defendant and others from the same conduct in the future.

See also Wis. Stat.§ 895.043(3).

[14] Majority op.,¶54.

¶ 97 The amount of potential harm is calculated by analyzing "'the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *TXO Production Corp. v. Alliance Resources Corp*., 509 U.S. 443, 460, (1993) (quoted source omitted).

¶ 98 In the instant case, the Kimbles were harmed. They had an offer to buy their property for $1.3 million. They wanted to sell. They chose to reduce the asking price to secure the sale because they needed to care for aging parents who had lost their home. The Kimbles introduced evidence that the sale failed because of the lack of road access, a defect in marketable title that had been insured by First American.

¶ 99 The Kimbles had purchased title insurance to protect them from damages arising out of the unmarketability of their title. The policy limit was $370,000. The value of the property with marketable title was about three times the policy limit.

¶100 The majority opinion erroneously asserts that a consideration of the loss of value of Kimbles' home would force the court "to depart from the facts of the record and speculate that, had the Kimbles failed to discover First American's bad faith, they would have been completely unable to sell their property, rendering it valueless." Majority op.,¶62.

¶ 101 Yet this potential harm is borne by the record. The lack of access constituted "unmarketability of the title."[15] The policy itself defines "unmarketability of the title" as "an alleged or apparent matter affecting the title to the land . . . which would entitle a purchaser of the estate [or the Kimbles] to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." As First American's agent stated in a deposition entered into

---

[15] "[E]ven if the policy does not expressly cover lack of a right of access, if it insures against unmarketability of the title, the title insurer will be liable if no legal access to the land exists. The majority rule is that lack of access makes title unmarketable." 1 Joyce D. Palomar, *Title Insurance Law*§ 5:8 (West 2013-2014).

evidence at trial, the risk of wrongly denying the claim was that the Kimbles "would have had a real big claim on the policy . . . ."

¶ 102 In *Trinity*, the facts were similar. The insured in *Trinity* would have incurred a potential loss of up to $490,000 (damages in the auto accident case), had the insurance company successfully continued to deny Trinity Church's claim. The majority opinion in *Trinity* used the $490,000 figure for evaluating the punitive damages award.

¶ 103 In the instant case, the Kimbles would have potentially incurred a loss of up to $1.3 million, the sale price of the property if they had marketable title, and would not have recovered First American's title policy limits ($370,000), had First American successfully denied the Kimbles' claim.

¶ 104 The majority opinion refuses to use the $1.3 million sale price or $370,000 policy limit figures to calculate punitive damages. Instead the majority opinion adopts the reasoning of the dissent in *Trinity*.

¶ 105 Justice Sykes' dissent in *Trinity* argues that the insured "was never at risk for the auto accident damages, because either the agent (that is, his error and omissions carrier) or [the insurance company] was responsible for the mistake in the insurance application. The actual compensatory damages in the bad faith claim consisted of the attorneys' fees Trinity [Church] incurred in the coverage dispute, not the personal injury damages in the underlying lawsuit, which Trinity [Church] would not and did not have to pay." *Trinity*, 261 Wis. 2d 333, ¶ 106.

¶ 106 The majority opinion in the present case follows Justice Sykes' approach by severely limiting what is actual and potential harm, rather than employing the correct *Trinity* majority opinion approach of using "the harm that is likely to result."[16]

---

[16] *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

¶ 107 When title is not marketable, the significantly reduced value of the property and the inability of an insured to collect from the title insurance company are exactly "the harm[s] that [are] likely to have occurred" when a title insurance company fails to pay a worthy claim. Thus, the proper potential harm is at least the policy limits of $370,000, if not the lost sale of the house ($1.3 million), or both, rather than the mere $40,000 used by the majority opinion.

¶ 108 As to the proper ratio here, the majority opinion relies upon its mistaken "reprehensibility of conduct" analysis to justify a lower ratio than the *Trinity* 7:1 ratio of punitive damages to potential harm and the 200:1 ratio of punitive damages to actual damages that this court held constitutional. *Trinity*, 261 Wis. 2d 333, ¶¶65, 68, 105; majority op., ¶66.

¶ 109 Even though the misconduct of First American here is essentially analogous to the misconduct in *Trinity* and may even be more egregious, the majority opinion applies only one guiding principle: High numbers for compensatory and punitive damages are bad; low numbers are good.

¶ 110 The majority settles on its 3:1 ratio for no ostensible reason other than that it is lower than the 7:1 and 200:1 ratios in *Trinity* and the 4:1 ratio in Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 23-24 (1996). Yet in *Pacific Mutual Life Insurance Co.*, the United States Supreme Court held that the 4:1 ratio was "close to the line," not over it.

¶ 111 The majority opinion also looks to a newly adopted state statute, which fixes $200,000 or a 2:1 ratio of punitive damages to compensatory damages as the limits for punitive damages awards. Majority op.,¶66 n.23. The statute is irrelevant. The majority opinion deliberately defies the legislative direction that the statute does not apply to the present case. Furthermore, the constitutional due process doctrine that we must apply in the present case rejects a fixed amount for punitive damages or a fixed multiplier. "Excessive" for due process purposes is a "fluid concept" that takes

"substantive content from the particular context[] in which the standard[] [is] being assessed."[17]

¶ 112 What was good enough for the *Trinity* court seems to no longer be good enough for the majority opinion in the present case.

IV.

¶ 113 The fifth *Trinity* factor is "a comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Trinity*, 261 Wis. 2d 333, ¶66. I agree with the majority opinion that the imposition of criminal or civil fines does not directly impact the amount of punitive damages in the instant case, for the same reasoning we used in *Trinity*. *See* majority op., ¶69.

¶ 114 Nevertheless, the prohibited conduct's punishment by criminal sanctions under Wis. Stat. § 601.64(4) evinces the legislative determination of the reprehensibility of First American's misconduct.

V.

¶ 115 The sixth *Trinity* factor is the wealth of the wrongdoer. The United States Supreme Court has also recognized the wealth of the wrongdoer as a factor to be considered in gauging the constitutionality of a punitive damage award.[18]

¶ 116 The purpose behind the wealth factor is to punish wrongdoers and make the penalty for wrongdoing sufficiently

---

[17] *Cooperman Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

[18] The wealth and financial position of the defendant are examined to assess the excessiveness of the punitive damages award. *See, e.g.*, *TXO Production Corp.*, 509 U.S. 443, 462 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1996).

high for wealthy wrongdoers that they are deterred from engaging in future misconduct.[19]

¶ 117 In the instant case, the record demonstrates that in 2010, First American had revenues over $2 billion and net profits of $65 million. First American easily had the ability to pay the $1 million the jury awarded as punitive damages and then some.

¶ 118 Yet in the instant case, the majority opinion's result, as I noted previously, creates a final combined punitive and compensatory damages amount of $239,738.49—a sum smaller than the title insurance policy limit of $370,000. The majority opinion makes First American's wrongdoing an efficient course of business. First American in fact pays less by acting in bad

---

[19] The majority opinion states the purpose of punitive damages as follows:

> [Punitive damages] are awarded "to punish the wrongdoer, and to deter the wrongdoer and others from similar conduct." *Trinity*, 261 Wis. 2d 333, ¶50. "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

Majority op.,¶43.

Justice Steinmetz articulated the reasoning behind considering the wealth of the parties in his dissent in *Brown v. Maxey*, 124 Wis. 2d 426, 452, 369 N.W.2d 677 (1985) (Steinmetz, J., dissenting). He stated:

> The policy justifications for punitive damages are generally considered to be: punish the wrongdoer and specifically deter him and generally deter others from engaging in similar conduct. . . . It is almost universally accepted that money talks. By tailoring the amount of punitive damages to the relative wealth of the individual, every wrongdoer is more or less equally affected by the sanction.

faith and wrongfully refusing to pay the Kimbles' claim than it would have paid had it honored the claim in good faith after discovering its error. This result directly contravenes the entire purpose of punitive damages, let alone the purpose of awarding punitive damages against a wealthy defendant.[20]

¶ 119 The majority opinion again strays from *Trinity*. *Trinity* held, contrary to the majority opinion in the instant case, that evidence of the insurance company's wealth and ability to pay the full amount was "sufficient to justify the size of the punitive damages award." *Trinity*, ¶69. In *Trinity*, the company would have had to liquidate assets to pay the award.[21] First American has no similar concern here.

¶ 120 The majority opinion dismisses the wealth factor in the present case in a footnote, flouting *Trinity* and the United States Supreme Court cases. The majority opinion states simply that "it is not significant in this case." Majority op., ¶70 n.25. Why is the wealth of First American not significant in this case? The majority opinion does not explain, other than to cryptically state that "[t]he record indicates that First American would likely be able to pay the amount specified by the jury." Id. Is the majority opinion implying that First American's ability to pay means the punitive damages were too low or that the punitive damages can never be high enough to deter First American's misconduct in the future? Is First American too big, too well-to-do to punish?

---

[20] This rationale was echoed by the court in *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 631, 563 N.W.2d 154 (1997), which explained the need to eliminate the profit motive for wrongdoing:

> Punitive damages, by removing the profit from illegal activity, can help to deter such conduct. In order to effectively do this, punitive damages must be in excess of the profit created by the misconduct so that the defendant recognizes a loss.

[21] *Trinity*, 261 Wis. 2d 333, ¶69 n.8.

* * * *

¶ 121 The majority opinion has ignored and misapplied the *Trinity* test to substantially similar facts in the present case and reaches an outcome contrary to *Trinity*.

¶ 122 The majority opinion achieves a result in which the wrongdoer is enriched by its wrongdoing. First American ends up paying less in damages for acting improperly than it would have paid had it acted properly and paid the claim. This result, in my opinion, cannot stand.

¶ 123 For the foregoing reasons, I dissent.

¶ 124 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissent.

APPENDIX B

COURT OF APPEALS DECISION DATED AND FILED

October 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2011AP1514 Cir. Ct. No. 2009CV188

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

ROBERT L. KIMBLE and JUDITH W. KIMBLE,

Plaintiffs,

v.

LAND CONCEPTS, INC., JOHN E. STEVENSON and JANE E. STEVENSON, Trustees of the John E. and Jane E. Stevenson Revocable Trust, DORENE E. DEMPSTER and MARK F. HERRELL,

Defendants,

JOHN E. STEVENSON and JANE E. STEVENSON,	)
Defendants-Respondents,	)
FIRST AMERICAN TITLE INSURANCE COMPANY,	)
Defendant-Appellant.	)

APPEAL from a judgment and an order of the circuit court for Door County: D. TODD EHLERS, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. First American Title Insurance Company appeals a judgment, entered upon a jury verdict, awarding John and Jane Stevenson $29,738.49 in compensatory damages and $1,000,000 in punitive damages, and an order denying in part First American's postverdict motions. First American challenges certain rulings made by the circuit court prior to trial, a special verdict answer, and the amount of damages awarded by the jury. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In October 2004, Robert and Judith Kimble purchased real estate in the Town of Nasewaupee in Door County from Dorene Dempster and Mark Herrell. Dempster and Herrell had in turn purchased the property from John and Jane Stevenson who, in 1989, purchased what would become the Kimble lot, together with a lot north of what would become the Kimble lot from Robert Anderson and William Green, personal

representatives of the estate of Gertrude Anderson. When the Stevensons sold the future Kimble lot to Dempster and Herrell, the Stevensons retained the lot to the north.

¶3 The Kimble property is land and water locked. To the north is the property owned by the Stevensons, to the east is Sawyer Harbor, and to the south and west is property owned by Land Concepts, Inc. The closest major roadway to the property is County Highway M, which is located west of the property, on the other side of land owned by Land Concepts.

¶4 When the Stevensons took title to their property, including what would later become the Kimbles' lot, title to the properties was transferred to the Stevensons by warranty deed which warranted an easement "in the use of a private road," which runs along the western boundary of both properties to County Highway M. That easement was warranted by the Stevensons when they sold the Kimble Lot to Dempster and Herrell, and it was warranted by Dempster and Herrell when they sold the lot to the Kimbles. At the time the Kimbles purchased their property from Dempster and Herrell, the only improved access from their property to County Highway M was over the private drive.

¶5 On the same day the Stevensons purchased their property, including the property that was eventually purchased by the Kimbles, Land Concepts recorded an easement, which granted to the "Estate of Gertrude P. Anderson, deceased" an access easement across its land to County Highway M, which was located approximately 150 feet to the west of the private drive. It is undisputed that the private drive utilized by the Kimbles to access County Highway M

was not located within this easement granted by Land Concepts.

¶6 As part of their purchase, the Kimbles obtained a title insurance policy from First American. The policy insured the Kimbles "against loss or damage … sustained or incurred by the insured by reason of … [u]nmarketability of the title [or] … [l]ack of a right of access to and from the land." "Unmarketability of the title" was defined by the policy as:

> [A]n alleged or apparent matter affecting the title of the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

¶7 In 2008, the Kimbles attempted to sell the property. In March 2008, Land Concepts sent a letter to the Kimbles' realtor advising the realtor that the private drive the Kimbles used to access their property was on land owned by Land Concepts, and not subject to any access easement rights granted by Land Concepts to the Kimbles, and, therefore, the Kimbles did not have access rights from their property to County Highway M via that road and could not "convey any access rights to [County] Highway M" to any purchaser. Thereafter, in June 2008, Land Concepts notified the Kimbles' attorney that it intended to close the Kimbles' access over its property if the access issue was not promptly resolved. The Kimbles hired an attorney who in March 2008 notified First American that the Kimbles had a possible claim under the title insurance policy both due to lack of access and

unmarketability due to lack of access. First American denied that the policy coverage had been triggered.

¶8 In 2009, the Kimbles brought suit against Land Concepts, the Stevensons, Dempster and Herrell, seeking a declaration regarding their rights in the private road used to access their property from County Highway M. The Kimbles later amended their complaint to add a claim of breach of title insurance against First American. The Kimbles eventually reached a settlement agreement with all of the defendants except First American. Under the terms of the settlement agreement, Land Concepts agreed to convey an easement over the existing private driveway for the benefit of the Stevensons' property and the Kimbles' property in exchange for $40,000. In addition, the Stevensons agreed to pay the Kimbles $10,000, and the Kimbles agreed to assign to the Stevensons their rights and interest in their First American title insurance policy, including any and all claims against First American stemming from First American's denial of coverage.

¶9 In August 2010, the Stevensons filed a cross-claim against First American, alleging breach of contract as well as breach of fiduciary duty and bad faith. Prior to trial, First American filed a motion in limine, seeking to preclude the introduction of any evidence that the Kimbles' title to the property was unmarketable as a result of lack of access. The court denied the motion.

¶10 At the evidentiary hearing on First American's motion in limine, however, the court went on to rule that whether coverage had been invoked under the policy due to non-marketability presented a question of law that it, not the jury, must decide. The court concluded that coverage had been invoked under the

policy for both lack of access to the property and non-marketability due to the lack of access.

¶11 The matter proceeded to a jury trial on the issues of whether First American breached its contract with the Kimbles, whether the Kimbles suffered a loss as a result of any breach, and whether First American acted in bad faith. The jury found that First American breached its contract with the Kimbles, breached its duty of good faith in performing its contract with the Kimbles, and exercised bad faith in denying the Kimbles' requested defense of title and claim. The jury awarded the Stevensons $50,000 in compensatory damages for First American's breach of contract and $1,000,000 in punitive damages for First American's bad faith.

¶12 Following the jury's verdict, First American moved the circuit court to: (1) reduce the compensatory damages award to $28,485.49; (2) modify the jury's "yes" answer to the question of bad faith on the basis that there was insufficient evidence to support that finding; and (3) in the interest of justice, set aside the jury's verdict and order a new trial on the basis that the punitive damages award was excessive. The circuit court agreed that the amount of compensatory damages should be reduced, but only to $29,738.49; however, it denied First American's other motions. First American appeals.

DISCUSSION

¶13 First American raises numerous challenges to the proceedings before the circuit court. We observe that these challenges fit into four main categories:
(1) whether the Stevensons could prosecute the Kimbles' claims against First American; (2) whether

the evidence was sufficient to establish that coverage under the policy was invoked; (3) whether First American acted in bad faith; and (4) whether punitive damages were awardable to the Stevensons for First American's bad faith and, if so, whether the amount awarded was excessive and therefore violated due process.[1] We address each issue in turn.

A. Stevensons' Right to Assert the Kimbles' Claims

¶14 First American contends that the Stevensons did not have the right to assert the Kimbles' claims against First American because those claims were not assignable and therefore any assignment of the Kimbles' claims to the Stevensons was void. First American argues that, under the terms of the policy, assignment of any of the Kimbles' claims against First American was not permissible.

¶15 First American refers this court to four provisions in the policy, which include the definition of "insured," the definition of "insured claimant," a provision entitled "continuation of insurance after conveyance of title," and a provision entitled "determination, extent of liability and coinsurance." It asserts, without explanation, that under those provisions, "[a] policy claim may be made only by the named insured or a successor insured who takes title by operation of law." However, as pointed out by the Stevensons, First American conceded before the circuit

---

[1] To the extent that First American may have attempted to, or intended to, raise argument on appeal that we have not addressed, we have not done so because we deem those arguments insufficiently developed. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

court that the Kimbles had a right to assign their claims against First American to the Stevensons. At a pretrial conference, the court addressed a motion in limine made by the Stevensons in which they sought to exclude evidence or argument by First American that the Kimbles did not have a right to assign their claims to the Stevensons. Counsel for First American stated: "I don't disagree that it would be improper for us to raise issues regarding the assignment. I think that we all agree that the Kimbles had the right to assign their claim."

¶16 We read First American's brief as also arguing that even if the Kimbles could assign their breach of contract claims to the Stevensons, they could not assign their tort claim for bad faith, and even if the Kimbles could assign their bad faith claim, the Stevensons still did not have the right to seek punitive damages. First American argues that there is no Wisconsin case permitting the assignment of a bad faith claim or breach of fiduciary duty in an insurance context, and it cites to four out-of-state cases for the proposition that bad faith punitive damages claims are not assignable. Again, as the record shows, First American conceded the Kimbles' right to assign their claims to the Stevensons. Furthermore, the supreme court held that insurance policies may not limit the assignment of an insured's causes of action after loss, *see, e.g.*, *Max L. Bloom Co. v. United States Casualty Co.*, 191 Wis. 524, 210 N.W. 689 (1926), and the court has observed that "assignment of [an] insured's bad faith claim … is a common occurrence." *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 67, 307 N.W.2d 256 (1981).

¶17 Finally, First American argues that the Stevensons had no claims to assert against it because

the Kimbles voided their policy by settling with the other defendants without providing notice to First American and by releasing the Stevensons from liability. First American relies on the following policy language: "The company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the company." The Kimbles did not assume liability in the settlement. Accordingly, the provision relied upon by First American does not apply here. We therefore reject this argument.

B. Coverage Under the Policy

¶18 First American contends that the circuit court erred in determining, prior to trial, that coverage was invoked under the Kimbles' title insurance policy.

¶19 The interpretation of the contractual language contained within an insurance policy presents a question of law that is reviewed independently by this court. *Zurich Am. Ins. Co. v. Wisconsin Physicians Servs. Ins. Corp.*, 2007 WI App 259, ¶11, 306 Wis. 2d 617, 743 N.W.2d 710.

¶20 The Kimbles' policy provides coverage in the event that the Kimbles suffered loss or damages due to the "[u]nmarketability of the title" or the "[l]ack of a right of access to and from the [insured] land." The circuit court determined that coverage under the policy was invoked because the Kimbles did not have a right of access to their property and, because of that lack of access, the title to the property was unmarketable. First American argues that, contrary to the court's determination, the Kimbles had three points of access to their property.

¶21 First American first claims that the Kimbles had access to their property via the access easement granted by Land Concepts to the "Estate of Gertrude P. Anderson, deceased" as beneficiary in 1989, which ran along the western side of the Kimbles' property. First American claims on appeal that this easement remained valid, not having been terminated by either Land Concepts or any provision within the easement.

¶22 The access easement was unilaterally drafted and signed by a representative of Land Concepts, and then filed with the register of deeds in 1989. The easement made Land Concepts' property to the west of the Kimbles' property the servient estate and provided:

> The easement shall exist for benefit of beneficiary, and for beneficiary's business and social invitees. The easement will also inure to the benefit of beneficiary's successors and assigns, but only in the event beneficiary complies with the terms and provisions herein below set forth. In the event it should be the desire of beneficiary (or any successor of beneficiary), to make the terms and provisions of the easement available to any successor, assign, or grantee; beneficiary shall first provide to [Land Concepts], a copy of a bona fide good faith Offer to Purchase as received from such proposed transferee or grantee. Beneficiary shall fully disclose to [Land Concepts] all terms, conditions, agreements, and understandings between beneficiary and such proposed grantee or transferee, and shall make the same terms, provisions, and conditions available to [Land Concepts] for a

period of ten business days following receipt by [Land Concepts] of such written notice and all such disclosures….

….

[T]he "first right of refusal" herein provided shall be available to [Land Concepts] in the event of any subsequent proposed conveyance to any subsequent proposed grantee or transferee, in accordance with the terms and provisions hereof.

Any beneficiary desiring to list its property for sale may request of [Land Concepts], a waiver of [Land Concepts'] "right of first refusal" which [Land Concepts] may—but shall not be obligated to—furnish. No such waiver shall be valid for any period of time exceeding 6 months.

….

In the event that any party or entity shall record any deed or conveyance (including—but not limited to—a Land Contract or Lease with Option or a Lease for a term of 5 years or more), which conveyance purports to convey lands subject to any individual easement, or proports [sic] to convey an interest in such easement; and in the further event that the party or entity making or attempting to make such conveyance has not obtained a waiver as herein set forth, or has not offered to [Land Concepts] the "right of first refusal" as herein specified; then immediately upon the recording or attempted recording of such conveyance any individual easement subject to these uniform terms and provisions shall immediately cease

> and terminate; and [Land Concepts] shall be authorized to record a termination statement in the office of the Register of Deeds in and for the County where said lands are situated, evidencing the termination of such easement.

¶23 In response, the Stevensons argue that prior to this appeal, First American denied the validity of any access via the west easement. They note that in a March 2008 letter, Donald Schenker, assistant vice president of First American, identified three problems with this easement: (1) it was made out to a nonexistent legal entity, namely the "Estate of Gertrude P. Anderson, deceased"; (2) there were problems regarding whether there had been proper delivery of the deed; and (3) contrary to WIS. STAT. § 706.02(1)(b) (2009-10),[2] the conveyance failed to identify the land that the easement was purported to benefit. The Stevensons further argue that at no time has Land Concepts been given a right of first refusal for the purchase of the Stevensons' and Kimbles' property, and, therefore, the easement terminated by its own terms.

¶24 First American fails to explain on appeal why the easement did not terminate by its own terms when the Stevensons' and Kimbles' land was originally conveyed to the Stevensons in 1989, or any time thereafter upon transfer, and has not explained to this court why the easement is not invalid for any of the reasons identified by Schenker in his March 2008 letter. We take First American's silence as a concession and we will not address the issue. *See Hoffman v.*

---

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Economy Preferred Ins. Co., 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App.1999) ("[a]n argument to which no response is made may be deemed conceded for purposes of appeal").

¶25 First American argues that the Kimbles also had access to their property from the south, along Idlewild Woods Drive. Idlewild Woods Drive is situated south of the Kimbles' property and runs from the south in a north-easterly direction toward the western boundary of the Kimbles' property. The completed portion of Idlewild Woods Drive stops approximately twenty-five feet from the Kimbles' property. The area between the completed portion of the road and the Kimbles' property is undeveloped land.

¶26 First American claims that since there is "unrebutted evidence" that that Idlewild Woods Drive had been platted to provide access to the property, it is "nonsense" for the Stevensons to claim there was no access to the Kimbles' property via Idlewild Woods Drive because that road was not completed all the way to the Kimbles' property. We read First American's brief as arguing that because the plat shows that Idlewild Woods Drive is completed to the Kimbles' property, the fact that it has not been completed, and may never be completed, is irrelevant under the title insurance policy. However, First American does not explain clearly why we should conclude that this is true under applicable Wisconsin law. Accordingly, we do not address this argument. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments and arguments lacking citation to legal authority need not be addressed).

¶27 Finally, First American argues that the Kimbles had access to their property from the north via the private road previously utilized by the Kimbles to

access their property. First American argues that the Stevensons should have been estopped from arguing that the "north easement" is invalid for a number of reasons. First American has not, however, shown that it raised this argument before the circuit court. Again, as a general rule, we do not review issues not shown to have been raised before the circuit court. *Schinner*, 143 Wis. 2d at 94 n.5. Furthermore, First American's estoppel claim aside, First American has not argued or shown that the court was wrong in concluding that the Kimbles did not have the right to use what First American refers to as the "north easement" to access their property. Accordingly, we do not further address this issue.

¶28 First American also challenges the circuit court's conclusion that a lack of access rendered the Kimbles' property unmarketable, arguing that a lack of access does not make a property unmarketable. However, because we affirm the court's ruling that the Kimbles' property lacked access, a covered event under the policy, we do not address this argument. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n. 1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

C. Bad Faith

¶29 First American contends that there was not sufficient evidence to support the jury's answer with respect to bad faith and, therefore, the circuit court erred in denying its motion to modify that answer.

¶30 Any party may move the court to change an answer in a verdict on the basis that there was insufficient evidence to support the answer. *See* WIS. STAT. § 805.14(5). However,

> No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, *there is no credible evidence to sustain a finding in favor of such party*.

Section 805.14(1) (emphasis added). When we review a circuit court's denial of a motion to change verdict answers, we must affirm if there is any credible evidence to support the jury's verdict, even if contradictory evidence is stronger and more convincing. *See Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995).

¶31 Bad faith is a tort "separate and apart from a breach of contract." *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 686, 271 N.W.2d 368. "It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract," and as such, separate damages may be recovered for bad faith and for breach of contract. *Id.* at 687.

¶32 To prove bad faith against an insurance company, the plaintiff must establish: (1) the insurance contract provided coverage and required payment by the insurer; (2) there was no reasonable basis for the insurer to deny the insured's claim for benefits under the policy; and (3) the insurer knew of, or recklessly disregarded, the lack of a reasonable basis to deny the claim. *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶¶36, 49, 53-54, 334 Wis. 2d 23, 798 N.W.2d 467; *Anderson*, 85 Wis. 2d at 692. *See also* WIS

JI—CIVIL 2761. If an insurance company conducted a thorough investigation of the facts and circumstances giving rise to the insured's claim and reasonably concluded that the claim was fairly debatable or questionable, the denial of the claim is not in bad faith. WIS JI— CIVIL 2761.

¶33 First American argues that the jury's finding that it acted in bad faith must be reversed because the Stevensons did not prove by clear and convincing evidence that there was a breach of contract by First American, i.e., a wrongful denial under the insurance contract. Alternatively, First American argues that their denial of the claim was not in bad faith because coverage under the policy was at least "fairly debatable."[3]

¶34 For the reasons discussed above in paragraphs 18-27, First American is incorrect that the Stevensons failed to establish that the Kimbles suffered a covered loss under the policy. Furthermore, we consider First American's assertion that coverage under the policy was "fairly debatable" to be conclusory and insufficiently developed, and reject it on that basis. See Pettit, 171 Wis. 2d at 646-47 (an appellate court need not consider conclusory assertions and undeveloped arguments).

---

[3] First American also argues that bad faith was not established because the Stevensons failed to present evidence that First American acted with an "evil motive." Proof of "evil motive" is not a prerequisite to a finding of bad faith. A showing of "evil intent deserving of punishment or of something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct" is, however, a requirement in order for punitive damages to be awarded for bad faith. *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 697, 271 N.W.2d 368 (1978).

¶35 First American also argues that the judgment should be vacated because "[t]he [circuit] court's instructions and rulings" prevented it from presenting an effective defense to the Stevensons' bad faith claim. Those "instructions and rulings" include allowing the Stevensons' attorney to inform the jury that the court had already ruled on the issues of access, marketability and coverage under the policy, and precluding First American from presenting evidence about the Kimbles' settlement with the other defendants. First American has not demonstrated that it raised an objection to this information before the circuit court and, as we have explained, we do not review issues not shown to have been raised in the circuit court. *Schinner*, 143 Wis. 2d at 94 n.5.

D. Damages

¶36 First American argues that the compensatory and punitive damages awarded by the jury must be nullified.

1. Compensatory Damages

¶37 First American argues that any compensatory damages awardable to the Stevensons is limited to one-half of the cost to buy the new access easement. First American claims that, because the cost of the new easement was $40,000, the loss payable by it is no more than that amount. It further argues that half of the $40,000 is payable by the Stevensons because the easement benefits both the Kimbles' and the Stevensons' property. First American did not raise this argument in its postverdict motion. Because the issue was not raised before the circuit court, it will not be

considered now. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

2. Punitive Damages

¶38 First American argues that the $1,000,000 punitive damages award violated due process because the amount awarded was excessive.

¶39 Punitive damages may be imposed to punish unlawful conduct and deter its repetition. *Trinity Evangelical Lutheran Church & Sch.—Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶46, 261 Wis. 2d 333, 661 N.W.2d 789. Although the award of punitive damages lies within the discretion of the jury, the jury's discretion in awarding punitive damages is not unfettered. *See id.*

¶40 The Due Process Clause of the Fourteenth Amendment imposes substantive limits on the size of a punitive damages award. Id., ¶49. "An award is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages, or inflicts a penalty or burden on the defendant that is disproportionate to the wrongdoing." Id., ¶50. To determine whether an award of punitive damages is excessive, the United States Supreme Court has set forth, and the Wisconsin Supreme Court has applied, a three-part test. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996); *Trinity*, 261 Wis. 2d 333, ¶¶52, 57-68. This test requires a court to weigh: (1) the degree of egregiousness or reprehensibility of the conduct; (2) the disparity between the harm, or the potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages and the possible civil or criminal penalties imposed for the conduct. *BMW*, 517

U.S. at 575; *Trinity*, 261 Wis. 2d 333, ¶52. While these are the most significant factors, other factors may be relevant in light of the facts in the case at hand, including the degree of any malicious intent and whether the punitive damages award bears a reasonable relationship to the award of compensatory damages. *Trinity*, 261 Wis. 2d 333, ¶¶53, 69. In weighing these factors against the facts of a particular case, "the evidence must be viewed in the light most favorable to the plaintiff, and a jury's punitive damages award will not be disturbed, unless the verdict is so clearly excessive as to indicate passion and prejudice." Id., ¶56.

¶41 When a punitive damages award is appealed as unconstitutionally excessive, we review the award de novo. *Id*., ¶¶47-48. However, we do not undertake that review here because we consider First American's argument to be insufficiently developed, and reject First American's arguments on that basis.[4]

CONCLUSION

¶42 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

---

[4] First American claims that the punitive award in this case is unconstitutionally excessive because it "does not correlate with five of the six factors which this court must weigh." However, in support of this assertion, it sets forth only broad and conclusory statements without citation to the record and without citation to legal authority.

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT
DOOR COUNTY
BRANCH 1

ROBERT L. KIMBLE and JUDITH W. KIMBLE, *Plaintiffs*, v. LAND CONCEPTS, INC.; JOHN E. STEVENSON and JANE E. STEVENSON, Trustees of the John E. and Jane E. Stevenson Revocable Trust; DORENE E. DEMPSTER and MARK F. HERRELL; and FIRST AMERICAN TITLE INSURANCE COMPANY, *Defendants*.	Court Case: 09-CV-188 FILED Jun 14 2011

ORDER GRANTING IN PART AND DENYING IN PART POST-VERDICT MOTIONS, AND ORDER FOR JUDGMENT

This matter having come on before the Court on May 27, 2011 for hearing on the Defendant, First American Title Insurance Company's Motions After Verdict as well as Defendants, John E. And Jane E. Stevenson's Motion for Judgment as well as their request to add to the jury's award their actual attorneys

fees for time spent post-verdict, the Stevensons' having appeared by their counsel, David H. Weber, and the Defendant First American Title Insurance Company having appeared by their counsel, John R. Petitjean and Kristine A. Pihlgren, the Court having considered all files, records, and proceedings, and having heard the oral argument of counsel, for the reasons set forth on the record;

IT IS HEREBY ORDERED:

(1) The Court grants in part First American Title Insurance Company's motion to modify the Jury's award, and orders that the Answer to Question No.4 of the Special Verdict shall be and hereby is modified to reflect an actual damage award reduced to $29,738.49;

(2) All other aspects of First American Title Insurance Company's post-verdict motions are denied;

(3) The Stevensons' request to add to the jury's award their actual attorneys fees for time spent post-verdict is denied;

(4) The Court orders that Judgment shall be entered on the Verdict in the amount of $1,029,788.49, plus costs;

(5) The Clerk is directed to calculate interest on the Verdict pursuant to WIS. STAT.§814.04(4), so that twelve percent interest from March 3, 2011, until the date Judgment is entered is added to the costs to be taxed; and

(6) All other claims of the parties were previously resolved by settlement and are hereby dismissed without costs.

JUDGMENT

The Stevensons shall have Judgment from and against the Defendant First American Title Insurance Company in the amount of $1,029,738.49, plus post-verdict interest from the date of the verdict, March 3, 2011, together with costs and post-judgment interest at the statutory rate of twelve percent (12%) per annum until the Judgment is paid.

This is a final Judgment for purposes of appeal.

Dated this 14 day of June, 2011, NUNC PRO TUNC May 27,2011.

BY THE COURT:

By: /signed/
Honorable D. Todd Ehlers

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT
DOOR COUNTY
BRANCH 1

ROBERT L. KIMBLE and JUDITH W. KIMBLE, *Plaintiffs*, v. LAND CONCEPTS, INC.; JOHN E. STEVENSON and JANE E. STEVENSON, Trustees of the John E. and Jane E. Stevenson Revocable Trust; DORENE E. DEMPSTER and MARK F. HERRELL; and FIRST AMERICAN TITLE INSURANCE COMPANY, *Defendants*.	CASE NO: 09-CV-188 MOTION HEARING

HONORABLE D. TODD EHLERS
JUDGE PRESIDING

APPEARANCES:

DAVID H. WEBER, Attorney at Law, appeared on behalf of the plaintiffs, Robert L. Kimble, Judith W. Kimble, Judith W. Kimble appeared in person; the defendants, John E. Stevenson and Jane E. Stevenson, who also appeared in person.

JOHN R. PETITJEAN and KRISTINE A. PIHLGREN, Attorneys at Law, appeared on behalf of the defendant, American Title Insurance Company.

Date of Proceedings:
March 1, 2011

Lisa A. Hartel
Court Reporter

* * *

[136]

* * *

THE COURT: All right. Well, as I made it clear, Counsel, I hope last Wednesday when we spoke and when I scheduled this matter for an evidentiary hearing before the Court today versus starting the jury trial today with the jury trial to follow depending on how I ruled in this matter, the issue before the Court right now is the **[137]** additional motion in limine that Mr. Petitjean filed on First American's behalf on February 21st of 2011. It was the second motion in limine which sought an order of this Court that the Stevensons should be precluded from introducing any evidence or presenting any argument the Kimbles' title was unmerchantable.

I think we've all agreed, although I think at one point, Mr. Weber, you made the comment that unmerchantability or maybe Mr. Petitjean made this argument. I don't know who made it, but that unmerchantability is different than unmarketability. Well, my reading of the cases, Counsel, is they are one and the

same. So I don't know whoever made that comment, that one was way off.

So we're dealing with the claims of Mr. Weber's clients that there is coverage under First American's title insurance policy under items three and four on the front page of that title policy which provides: "Insurance against loss or damage as a result of unmarketability of the title," that's three, or four, "lack of right of access to and from the land."

Unmarketability of title is defined in **[138]** the definition of terms under the conditions and stipulations of the policy as follows: "Unmarketability of the title: An alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of a marketable title."

That's the way the title policy defines marketability. I've also done some research on the issue of marketability of title, and I would first reference the *Turner v. Taylor* case found at 268 Wis. 2d 628, which provides as follows: "A marketable title is one that can be held in peace and quiet, not subject to litigation to determine its validity, not open to judicial doubt. It has been described as measuring good title. However, title that is encumbered by an easement is not a good title."

I then go to the *Banker's Trust Company of California* case found at 261 Wis. 2d 855 which provides as follows: "Good title or marketable title are terms often used **[139]** interchangeably with some exceptions. Title that is encumbered by an easement is not a good title. Covenants, restrictions, and charges affecting the property involved, unless removed or released, will

constitute an encumbrance entitling the purchaser to refuse to take title as a bad or unmarketable title."

And then finally I would reference the *Douglas v. Ranson* case, which is a really old one, found at 205 Wis. 439 that says: "Marketable title must be salable without abatement of price and salable on face of record."

Marketable title, in my determination, is liens, encumbrances, matters affecting that property which affect the sale price of that property. Obviously, the Kimbles had this property for sale. Nobody is arguing about that. Additionally, the Kimbles' realtor got a letter from Mr. Johnson of Land Concepts, Limited, on March 5th of 2008 that provides at the second paragraph as follows:

"In order to avoid possible future misunderstandings and/or confusion, it is important that you make representative purchasers aware that the present owners of that property do not own and **[140]** cannot convey any access rights to Highway M, closed quote.

I don't know what could affect marketability of title more than somebody trying to sell their property and their realtor getting a letter from — like this from a neighbor saying,"You don't have access to that property."

So, Mr. Petitjean, your motion to preclude Mr. Weber in his presentation of his case on his clients' behalf, to preclude him from introducing any evidence or presenting any argument that the Kimbles' title was unmerchantable or unmarketable is denied. That's the legal issue I had to decide.

I think there is — you know, was there access or not access, like I said, you know, there was a letter written saying you don't have access. Now, you know, was there bad faith on the title company not pursuing

that issue on the Kimbles' behalf and this having to result in liti-gation? I've already ruled on all of those issues anyway. Those are all going to be the issues to be presented to the jury, but I'm not going to be precluding Mr. Weber from arguing there was an unmarketable title because under my reading **[141]** of those cases and those definitions and the definition in the policy there were issues regarding pleadings, restrictive covenants, issues regarding that property which affected its salability which would affect the sale price.

Now, you know, Mr. Petitjean, you are absolutely correct. Could the Kimbles have sold this taking — finding a buyer who would take the property subject to all of these question marks out there about the access, whatever? Sure. Probably. You know, that would have been a possibility. But would it have affected the purchase price? Would it have affected the value of that property? I think it's pretty disingenuous of the title insurance company to argue that it would not have affected the title.

So, you know, I'm finding there is coverage under this policy and, you know, now the issue before the jury is going to be First American's decision not to defend this, not to deny coverage. That's going to be the issue we're going to deal with tomorrow and Thursday.

All right. So to answer your question, Mr. Weber, you don't need to call any witnesses. **[142]**

MR. WEBER: Okay.

MR. PETITJEAN: Your Honor, can I ask just one thing —

THE COURT: Sure.

MR. PETITJEAN: for clarification?

THE COURT: Sure.

MR. PETITJEAN: I'm not arguing with the Court. I want to make that clear. It is my understanding that you are finding coverage and so we are not going to relitigate the access issue tomorrow, is — is that correct?

THE COURT: Yes.

MR. PETITJEAN: All right. And is it my also understanding when the Court's saying that the Kimble property was encumbered by an easement, are you referring to the easement that went over the Land Concepts' property?

THE COURT: Well, no. No. I'm not referring to an easement. I'm talking about a situation, a covenant, a claim of a neighbor that there is no access to this property, and that's not the easement. That's not — you know, there is some aspect to title to this property that's affecting the lack of a right of access to and from the property. That — I mean, I don't know how **[143]** much better the Land Concepts' letter could have put that issue into question regarding any potential buyer for the property or the current owners of the property, so that's the issue.

MR. PETITJEAN: Thank you, your Honor.

THE COURT: Okay. All right.

* * *

[144]

MR. WEBER: . . .I did have one point of clarification –

THE COURT: Oh, okay.

MR. WEBER: — on the Court's ruling, so we know what we're arguing before we leave what we just worked on this morning. It would be my intention to assert that — to the jury that there has been a legal determination that the Kimbles suffered a loss from a lack of access and unmarketability of title on both of those prongs, and I think that it makes sense to instruct us as to which or both of them we should use when we're using those words with the jury, and I think we did establish that there was no access that the Kimbles enjoyed at the time they purchased the property.

MR. PETITJEAN: Your Honor, I think the Court said there was a covered event under the policy.

THE COURT: Right. I — I — no. Mr. Weber, I disagree with what you said from the standpoint of I have determined that there's been a loss. I think that's going to be the issue for the jury. I've determined that this lack of access has affected the marketability of the title. Now, is this jury going to determine whether there was a **[145]** loss as a result of that or not, that I think is the issue you are taking to the jury.

MR. WEBER: I see. So it's okay, though, if I — if I assert to the jury that there's been a determination by the Court, that as far as the real estate title issue — as far as the title insurance issue is concerned, there was

coverage for lack of access and unmarketability of title if I could show a loss on either or both of those points?

THE COURT: Correct.

MR. WEBER: Okay. And I just want to — I thought that was the Court's ruling. I just want to make sure that when I use both of those areas for argument and talk about them conjunctively that I'm doing so correctly.

THE COURT: Right. And — and that's the point I'm making, Mr. Weber. I'm determining that this lack of access affected the marketability of the title. Now, is that — what loss or what amount of damage the jury is or is not going to find as a result of that, that's the issue.

MR. PETITJEAN: And, your Honor, and I'm not trying to insight, but there's been no decision on duty to defend; is that correct? Or is [**146]** that because there is a covered event the Court's finding —

THE COURT: Yeah. There is a — there was a duty to defend.

MR. PETITJEAN: Thank you for that clarification.

THE COURT: Sure. And, you know, Mr. Weber is arguing that there was, you know, unreasonable aspect to that, some bad faith aspect to that. That's what he's going to try to recover regarding.

* * *