COURT OF APPEALS
DECISION
DATED AND RELEASED

March 27, 1997

NOTICE

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

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No. 96-2400

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

STEVEN WOERPEL AND JULIE WOERPEL,

PLAINTIFFS-RESPONDENTS,

AETNA LIFE AND CASUALTY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

REG GILL,

DEFENDANT-APPELLANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

INSURANCE COMPANY OF NORTH AMERICA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: JAMES P. FIEDLER, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. The plaintiff, Steven Woerpel, was injured when, at the invitation of the defendant, Reg Gill, he shot a crossbow at a target inside Gill's van. He sued Gill for negligence and the jury found both parties at fault, apportioning the negligence 65% to Gill and 35% to Woerpel, and assessing damages at $131,719.03.

Gill and his business insurer, Insurance Company of North America (INA), appeal, claiming that: (1) the trial court erred in ruling that INA's policy provided primary coverage and that Gill's "personal" policy—a homeowners policy issued by American Family Insurance Company—provided only excess coverage; (2) the evidence was insufficient to support the jury's finding that Gill's negligence was a cause of Woerpel's injuries; (3) the trial court erred in instructing the jury with respect to a local ordinance prohibiting the firing of weapons at unapproved targets; and (4) because the risks to Woerpel in firing the crossbow were known, and the danger obvious, his negligence must be held to have exceeded Gill's as a matter of law. In addition, American Family has moved for costs and fees under the frivolous appeals statute, § 809.25(3), STATS., claiming that Gill should have known that his appeal of the coverage issue lacked any reasonable basis in law.

We see no error in the trial court's coverage ruling. As to American Family's motion for costs for a frivolous appeal, while we are unsure whether the

position advanced by Gill would pass muster under RULE 809.25(3), STATS.,[1] it is true, as he asserts, that we recently held that the rule "does not allow us to find that individual arguments in a brief are frivolous." ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834 (Ct. App. 1994), *aff'd*, 199 Wis.2d 268, 544 N.W.2d 428 (1996). We therefore deny the motion. We also conclude that the evidence of causal negligence on Gill's part was sufficient to support the jury's verdict, and that even if the challenged instruction could be considered erroneous, any error in giving it was harmless. Finally, we do not believe the open and obvious danger rule, which in certain circumstances operates as a defense when the plaintiff confronts an open and obvious danger, can apply to these facts to compel the conclusion that Woerpel's negligence exceeded Gill's as a matter of law. We therefore affirm the judgment and the trial court's order denying Gill's postverdict motions.

I. Background

Gill is a distributor for a tool company and sells tools out of a large, walk-in van. In 1993, he purchased several hand-held crossbows and, while making a regular stop at a Dodgeville factory, he told Woerpel, the factory's head mechanic, that he had "something new" to show him. In the van Gill had set up a target, and he handed Woerpel one of the crossbows and invited him to try shooting it. After expressing some

[1] The rule authorizes the assessment of costs and fees against a party who prosecutes an appeal which is without a reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. RULE 809.25(3), STATS.

surprise at the invitation, Woerpel fired the bow at the target. On his third "shot," the arrow ricocheted off an unknown object in the van and struck him in the eye.

Woerpel sued Gill, INA and American Family. The insurers disputed coverage and litigated that issue prior to trial in cross motions for summary judgment. The trial court ruled that, based on the "other insurance" clauses in each, INA's policy was primary and American Family's secondary. The case went to trial and, as indicated, the jury found Gill 65% negligent and Woerpel 35% negligent. In postverdict motions, Gill and INA asked the court to (1) reverse its coverage ruling, (2) change the jury's answer to the "cause" question to "No" on grounds that there had been a failure of proof on the issue, (3) order a new trial because the jury was erroneously instructed on the local ordinance, and (4) rule as a matter of law that Woerpel was more negligent than Gill.

The trial court denied the motions and this appeal followed. Additional facts will be discussed in the body of the opinion.

II. Insurance Coverage

Shortly after the action was filed, American Family moved for summary judgment dismissing the action against it on grounds that the "business pursuits" exclusion in Gill's policy applied to Woerpel's claim and that, as a result, there was no coverage for his injury. The trial court denied the motion, concluding that the exclusion was inapplicable—essentially because Gill's primary business was distributing and selling tools, and his occasional sale of crossbows was more of an avocation than a

business.[2] The insurers then sought a ruling as to which policy was primary and which was excess. The trial court, considering the "other insurance" provisions of both policies,[3] concluded that the American Family policy was excess:

> It is difficult to envision insurance contract provisions which could be more clear. Simply put, American Family coverage is excess over other insurance unless the other insurance is written as excess over the American Family policy. That is not the case here. The INA policy does not provide that it is excess over other coverage except in instances which are not relevant. No mental gymnastics have to be employed in order to determine that: (1) the policy provisions are not ambiguous and (2) applying the policy provisions, the INA coverage is primary.

Gill[4] does not challenge the court's conclusion. Rather, he maintains that, regardless of the policy language, the trial court's earlier decision on American Family's business-pursuits exclusion amounted to a holding that American Family's policy covers

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[2] The court stated:

> Gill's business pursuit was to sell tools or other supplies …. His possession of the crossbow, his showing it to Woerpel and permitting Woerpel to fire at a target was in the nature of a hobby. Because the presence of the crossbow in the Gill truck did not constitute a business pursuit, the American Family exclusion clause does not apply to this case.

[3] American Family's "other insurance" clause provides:

> This insurance is excess over other any other collectible insurance. However, if the other insurance is specifically written as excess insurance over this policy, the limits of this policy apply first.

INA's other-insurance clause provides (insofar as is relevant here):

> This insurance is primary except [in situations not relevant here]. If this insurance is primary, our obligations are not affected unless … the other insurance is also primary.

[4] Because Gill and INA have filed a joint brief, we will refer to them, collectively, as "Gill," except where the context requires otherwise.

Woerpel's injury and INA's does not.[5] Building on that assertion, he concludes that, because the two policies "insured different interests," the other-insurance clauses need not even be considered.

American Family does not directly challenge the cases cited by Gill for the proposition that other-insurance issues usually do not arise unless both policies cover the same loss. It does, however, strongly dispute the major premise of Woerpel's argument: that the trial court's earlier ruling determined that American Family's policy, and not INA's, covered his loss.

The sole issue considered by the trial court on American Family's summary judgment motion was whether a provision in the policy excluding coverage for acts arising out of "business pursuits of the insured" applied to Woerpel's claim. The term "business" is defined in the policy as "any profit motivated full or part-time trade, profession or occupation and the use of any part of any premises for such purposes." The trial court, concluding that selling crossbows "was not [Gill's] customary engagement or stated occupation," held that the policy exclusion did not apply.

Gill does not directly challenge the trial court's interpretation of the other-insurance clauses; nor does he offer any legal argument that the INA policy, by its terms, does *not* cover Woerpel's injury. He argues only that the court's decision on American Family's motion somehow contravenes and overrides its later determination that, under the other-insurance clauses, INA's coverage is primary.

[5] According to Gill, "the whole point of [the court's earlier] decision" was that "[t]his case involves a risk underwritten by American Family's homeowner's policy, but not by the INA business policy."

First, we agree with American Family that the trial court's decision was not as Gill describes it. The court decided only that the American Family business-pursuits exclusion did not apply. We also agree that the result of that decision—coupled with the apparent absence of any claim on INA's part that its policy does not cover Woerpel's loss—was that there was potential coverage under *both* policies for that loss. The major premise of Gill's coverage argument thus disappears and we reject it.

III. Sufficiency of the Evidence: Cause

Gill contends that Woerpel offered no evidence as to how the arrow came to strike him in the eye—in his words, "nobody knows what the arrow hit" or ricocheted from before it struck Woerpel—and that without specific evidence "of a link between the defendant's negligence and the ricochet," Woerpel failed to meet his burden of proof.

The trial court rejected a similar argument by Gill in his postverdict motions, finding the evidence of cause to be sufficient:

> It is obvious that [the arrow] hit something other than the target … because it came ricocheting back and hit Woerpel. We have [Gill's] negligence as found by the jury, of Gill encouraging Woerpel to use the target, Woerpel doing so and the arrow coming back and hitting him. I think cause and effect is pretty clearly established []here.

Appellate review of a challenged jury verdict is quite properly limited to a search for credible evidence—not for evidence that might sustain a verdict the jury could have reached, but did not, but for evidence supporting the verdict returned by the jury. ***Staehler v. Beuthin,*** 206 Wis.2d 609, 616, 557 N.W.2d 487, 489 (Ct. App. 1996). Thus, if there is any credible evidence in the record which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned. Section 805.14(1) STATS; ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410-11, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154, 368 N.W.2d 666 (1985). To overturn a verdict,

then, we must be satisfied that, considering all the credible evidence—and all reasonable inferences that can be drawn from that evidence—in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. Section 805.14(1); ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996). And if more than one inference can be drawn from the evidence, the inference that supports the jury's finding must be followed unless the testimony was incredible "as a matter of law." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757 (1990). Finally, we give special weight to the jury's finding where, as here, it has the specific approval of the trial court. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995).

Testimony at trial indicated that Gill came to Woerpel's place of employment and invited Woerpel into the van, telling him he had "something new" to show him. He handed Woerpel the crossbow and suggested that he shoot it at a target at the other end of the van. When Woerpel expressed surprise, asking "in your truck?," Gill indicated that several other people had shot the bow inside the van that day. Gill acknowledged encouraging his tool customers, including Woerpel, to use the weapons inside the van in hopes of selling them. Woerpel fired the bow three times, with Gill loading for him each time, and, as indicated, on the third shot the arrow ricocheted off some object in the van and struck Woerpel in the eye.

Gill makes much of the fact that Woerpel could not state exactly how the arrow came to strike him: "He could not state whether [it] came straight towards him, from the side, or even what part of the arrow struck him." According to Gill, "the van [has] a hard floor, steel shelving, tools hanging form the walls, items hanging from the ceiling, and numerous other objects off of which the arrow could have ricocheted," and Woerpel's failure to offer evidence of the arrow's exact trajectory, once it left the bow, requires

reversal of the jury's finding that his (Gill's) negligence was a cause of Woerpel's injury. The trial court disagreed, as do we.

Cause exists where the defendant's negligence was a substantial factor in producing the plaintiff's harm, and the term "substantial factor" means that "'defendant's conduct ha[d] such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.'" ***Fischer v. Ganju***, 168 Wis.2d 834, 857, 485 N.W.2d 10, 19 (1992) (quoted source omitted). "All that is required in negligence cases is for the plaintiff to present probable facts from which negligence and causal relations may be reasonably inferred." ***Ehlinger v. Sipes***, 155 Wis.2d 1, 13, 454 N.W.2d 754, 758 (1990). And the defendant's conduct need not be the sole, or even the primary, factor in causing the plaintiff's harm, for "'[t]here may be more than one substantial causative factor in any given case.'" ***Id.*** (quoted source omitted).

There is adequate evidence to support the jury's finding that both Gill and Woerpel were negligent, and Gill does not challenge those findings. Gill set up a target inside a cluttered van, suggested Woerpel shoot the crossbow at the target, allayed his concerns and loaded the weapon for him. We think he is hard pressed to claim that no reasonable jury could infer from such evidence that a causal relationship existed between his actions and the arrow's striking Woerpel. To track—as with a slow-motion camera—the arrow's precise flight after leaving the crossbow and ricocheting off one or more objects within the van seems to us to be not only as unrealistic as it is unnecessary but also probably irrelevant as to the question of cause in this case. The evidence was that Gill set in motion and encouraged the actions and events that led Woerpel to discharge a crossbow under circumstances in which some untoward event was reasonably foreseeable. We are satisfied, under the rules applicable to our review of such challenges, that sufficient evidence existed to support the jury's determination that Gill's negligence was a substantial factor in producing Woerpel's injury.

IV. Instructions

Gill next argues that the trial court erred in instructing the jury on a local ordinance requiring that archery targets on private property be equipped with backstops and approved by the chief of police. He claims the instruction "clearly left [the jury] with the impression that [his] actions were against the law," and that the ordinance had no application to this case because its opening words—"[n]o person shall shoot or discharge any … dangerous weapon anywhere in the City"—indicate that it applies only the person shooting at the target, in this case Woerpel.

Among other things, the trial court instructed the jury as follows with respect to the question of Gill's negligence:

> you are instructed that a Dodgeville City ordinance provides that an archery target on private property must be equipped with a good quality target and backstop. This ordinance also provides that no area on privately-owned property may be used for archery target practice unless first approved in writing by the Chief of Police.

It gave a similar instruction on the question relating to Woerpel's contributory negligence:

> you are instructed that a Dodgeville City ordinance prohibits the shooting of any cross bow anywhere in the city except in areas on private property determined by the Chief of Police to be safe for archery target practice.

While the trial court's justification for giving the instruction with respect to Gill's negligence seems eminently plausible—it stated that, even considering the "no person shall shoot" language, it would be unreasonable to consider the ordinance as anything but one to promote public safety, and thus be applicable to Gill as well as to Woerpel—we are satisfied that even if it could be considered error to so instruct the jury, any such error would be harmless. "Trial error is prejudicial only when it reasonably could be expected to affect the outcome of the case." ***McCrossen v. Nekoosa-Edwards Paper Co.***, 59 Wis.2d 245, 264, 208 N.W.2d 148, 159 (1973).

"The general rule that this court follows is that it will not reverse for error unless it appears probable from the entire evidence that the result would have been different had the error not occurred." ***Id.*** In this case, the jury had before it not only the testimony as to how Woerpel came to be firing the crossbow in Gill's van but also photographs of the van's interior, showing a narrow aisle with numerous tools and other items on shelves on both sides of the aisle and tools hanging from the ceiling. There was, in short, graphic evidence of countless obstructions in the small, enclosed area in which the injury occurred, and those observable facts, coupled with testimony as to the encouragement, assistance and reassurances Gill offered to Woerpel, constitute firm evidence of Gill's negligence. We note, too, that the jury was also instructed on the terms of the ordinance with respect to Woerpel's negligence. On this record we do not see any probability that, had the challenged instruction not been given, the result of the trial would have been different.

V. Open and Obvious Danger

Gill, describing Woerpel as a person with experience with weapons and familiar with the concept of ricocheting missles, argues that we should hold as a matter of law that Woerpel's negligence exceeded his own because Woerpel, in firing the crossbow in the van "confronted a known risk and an open and obvious danger."

We and the supreme court have occasionally utilized the open and obvious danger rule to determine negligence as a matter of law in certain limited instances, and Gill refers us to several such cases. The rule has been applied, for example, where a party dives into water of unknown depth or, in diving, attempts to avoid a known and visible underwater obstruction. ***Griebler v. Doughboy Recreational, Inc.***, 160 Wis.2d 547, 552, 466 N.W.2d 897, 899 (1991); ***Colip v. Travelers Ins. Co.***, 141 Wis.2d 363, 366, 415 N.W.2d 525, 527 (Ct. App. 1987). We have also applied the rule where, after loading a pistol and cocking the hammer, the plaintiff was wounded when the gun went off after being placed on a cabinet,

Schilling v. Blount, Inc., 152 Wis.2d 608, 611, 449 N.W.2d 56, 57 (Ct. App. 1989), and where a young man attempted to remove a large, flaming tree dangling from a ruptured high-voltage line. ***Hertelendy v. Agway Ins. Co.***, 177 Wis.2d 329, 332, 501 N.W.2d 903, 905 (Ct. App. 1993).

The rule has its basis in the recognition that "landowners [should be] immune from liability for injuries caused to invitees by conditions or activities that present dangers obvious to invitees, because invitees are, in most circumstances, expected to protect themselves from obvious dangers." ***Id.*** at 335, 501 N.W.2d at 906 (citing RESTATEMENT (SECOND) OF TORTS, § 343A(1) (1965)). And while it has, over the years, been applied to situations other than those involving landowners and invitees—to some types of products-liability claims, for example—we have recently recognized that because the rule determines negligence as a matter of law,

> [its] application should be limited to cases where a strong public policy exists to justify such a direct abrogation of comparative negligence principles. It should not be used to resolve liability issues in ordinary negligence cases, even where the plaintiff engaged in conduct that would clearly be negligent or could reasonably be foreseen as subjecting a party to a high risk of injury. These issues should be resolved by comparing the parties' conduct and apportioning negligence between them and not by absolving the defendant of any duty to the plaintiff.

Id. at 339, 501 N.W.2d at 908.[6]

Woerpel's conduct was undoubtedly negligent—the jury, after all, found him to be 35% at fault for his own injuries—and we assume it also "could reasonably be foreseen as subjecting [him] to a high risk of injury." Gill's argument is, in his words,

[6] In ***Rockweit v. Senecal***, 197 Wis.2d 409, 423, 541 N.W.2d 742, 748-49 (1995), the supreme court, apparently agreeing, stated that "in the ordinary negligence case, if an open and obvious danger is confronted by the plaintiff, it is merely an element to be considered by the jury in apportioning negligence and will not operate to completely bar the plaintiff's recovery."

that, by shooting the crossbow in the van, Woerpel "voluntarily encountered the known risk of a ricochet;" he asks us to apply the open and obvious danger rule to hold that Woerpel's negligence exceeded Gill's as a matter of law. Considering Woerpel's conduct in light of ***Hertelendy***, ***Rockweit v. Senecal***, 197 Wis.2d 409, 541 N.W.2d 742 (1995), and similar cases, we do not see it as warranting such a determination.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.