COURT OF APPEALS
DECISION
DATED AND RELEASED

July 29, 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. 96-2623

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

DOUGLAS M. WEED AND ELLEN K. WEED,

PLAINTIFFS-APPELLANTS-
CROSS RESPONDENTS,

BCBSM, INC.,

INVOLUNTARY-PLAINTIFF,

V.

STEVEN P. ANDERSON AND RURAL MUTUAL INSURANCE COMPANY

DEFENDANTS-RESPONDENTS-
CROSS APPELLANTS,

FRED B. BOETTCHER, JESSE J. CROWE AND BARRON COUNTY FARMERS MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Mohr, JJ.

PER CURIAM. Douglas Weed and Ellen Weed, his wife, appeal a judgment entered on a jury verdict finding no negligence on the part of Jesse Crowe for injuries Douglas Weed sustained while deer hunting. Weed argues (1) the evidence was insufficient as a matter of law to sustain the jury's finding of no negligence on the part of Crowe; (2) Weed is entitled to judgment notwithstanding the verdict; (3) the trial court made erroneous evidentiary rulings; (4) the trial court erroneously instructed the jury; (5) the trial court erroneously denied his motion for summary judgment; (6) the trial court erroneously failed to find Crowe guilty of trespass as a matter of law; and (7) Weed is entitled to a new trial in the interests of justice. We affirm the judgment.[1]

When reviewing the sufficiency of the evidence to support the verdict, we consider the evidence and all reasonable inferences therefrom in the light most favorable to the verdict. Section 805.14(1), STATS. We review the record with this principle in mind.

Dressed in blaze orange, as were the other eight members of his hunting party, Douglas Weed arrived around noon in the field where he was going to hunt. It was a clear cold November day during regular rifle season. Weed's parents lived in the area and he was planning to hunt with some friends who owned nearby hunting land. When he arrived, most of the members of his party

[1] Fred Boettcher, Steven Anderson and his insurer filed a cross-appeal; however, because they did not file a cross-appellant's brief, we do not separately address the cross-appeal.

were standing around the five vehicles eating lunch. Someone saw some deer and Weed heard shots. Weed was hit in his left hip and sustained severe injuries.

It was stipulated that the bullet which struck Weed was discharged from Jesse Crowe's rifle, an 8 mm Mauser. Brian Fellrath, a conservation warden, described the terrain from the approximate perspective where Crowe stood at the time of the shooting:

> The terrain is relatively flat. There is a slight roll to the country there. As you look straight out towards where the victim was, there is a corn field on the south side of the road there. And there is a gradual rise to a low hill or knoll in the corn field … then I could see nothing until I could see the distant tree line some distance past the corn field.

The terrain drops off significantly more behind the hill than it rises in front of the hill. Fellrath could see the tops of the closest trees behind the hill but not the bases. He estimated that the distance to the trees from where he stood would be approximately 600 yards.

Fellrath measured the distance between the shooter's location and the victim's location to be 1,724 feet. He testified that vehicles and people in the area where the victim was shot could not be seen from where the shooters stood.

Crowe testified that he lived near the scene of the accident and was familiar with the terrain. He was a graduate of a hunter's safety course and had hunted for five years. He and two companions arrived at a vacant house on 235th Avenue, planning to hunt to the north of the property. They parked approximately fifteen feet off the road. Standing by the truck, as they uncased and loaded their rifles, Crowe noticed four deer to the southwest in the picked cornfield across the road. The deer were running east. Crowe began firing at the lead deer as it ran

east. Anderson and Boettcher did the same. Crowe shot approximately four rounds, as did his companions.

Crowe testified that the deer were about 100 to 200 yards away. He testified that he was aware of a slight rise in the field but unaware of the amount of drop-off on the other side. He had never walked through the field before the incident and did not have permission to hunt in that field. He testified that as he would scan the rise, he saw woods in the background. Although the bases of the trees were concealed by the rise, he could still see some of the trunks and all the branches.

Crowe testified that he was taught in hunter's safety never to hunt without permission, never to fire over a road, and never to take an over-the-hill shot. He testified that it did not seem like an over-the-hill shot to him. He said that he saw deer running over level land with woods in the background. He sighted in the deer each time he took a shot. He was unaware that the depression behind the rise could have concealed vehicles or hunters.

Boettcher testified that he had a clear open shot with trees in the background. He testified the deer were running straight across the field and he saw no hill. Anderson testified that "[t]here was the open field and then the woods back behind the field which went up into a rise." He testified that he had a clear unobstructed view of the area all the way to the tree line, "except for a few feet covered by the hill that would have just been ground."

Weed argues that the evidence was insufficient as a matter of law to sustain the jury's finding of no negligence on the part of Crowe. "We will sustain a jury's verdict if there is any credible evidence to support it." ***Nowatske v. Osterloh,*** 201Wis.2d 497, 509, 549 N.W.2d 256, 260 (Ct. App. 1996). "It is the

jury's responsibility to determine the credibility of the witnesses and the weight to be afforded their testimony." ***Id.*** at 511, 549 N.W.2d at 261. "On appeal, it is this court's duty to look for credible evidence to sustain the jury's verdict, not to search the record for evidence to sustain a verdict that the jury could have reached, but did not." ***Id.***

The jury was instructed with respect to ordinary negligence. Negligence is the failure to exercise ordinary care under the circumstances. ***Marciniak v. Lundborg,*** 153 Wis.2d 59, 64, 450 N.W.2d 243, 245 (1990). "A party is negligent when he commits an act when some harm to someone is foreseeable." ***A.E. Invest. Corp. v. Link Builders, Inc.,*** 62 Wis.2d 479, 484, 214 N.W.2d 764, 766 (1974). Accidents sometimes happen when no one is at fault, and which the law regards as mere misfortunes. ***Chappell v. Town of Oregon,*** 36 Wis.2d 145, 149 (1874). In those cases, juries may rationally determine that the defendant exercised reasonable care. ***Id.***

Viewed in the light most favorable to the verdict, we must conclude the evidence supports the jury's finding that Crowe exercised reasonable care. All three defendants essentially testified that they had a clear shot at the deer across relatively flat terrain with dense woods as a backdrop. When examined regarding taking an over the hill shot, Crowe explained that it did not seem like an over-the-hill shot to him. The slight rise in the corn field concealed the victim and other members of his group. Crowe testified that he did not see any of the vehicles or the hunters. The conservation warden who investigated the shooting testified as follows:

> Q. You had noted from both respective positions [from which] you took photos that nobody could see from the hunters' perspective down to where you had marked as the victim's perspective, right?

A. That is correct.

….

Q. [B]ut at some time when you took the first visual sighting from where the shooter perspective was identified, you knew vehicles and people were down there and you couldn't see them?

A. That is correct.

Large color photos of the terrain were displayed to the jury. The jury apparently agreed that the topography which presented itself was deceptive in that the slight rise in the corn field did not appear high enough to conceal a hunter. The jury also apparently believed Crowe when he and his companions testified to the effect that he exercised reasonable care identifying his target, taking aim and firing his rifle at the deer in the corn field with the woods as a backdrop.

Weed argues that all the credible evidence establishes Crowe's negligence as a matter of law. He argues that Crowe admitted to getting excited every time he sees a deer, that he was within ten to fifteen feet of the road when he took his shot, and shot across the road. Although he was taught in hunter's safety not to fire within fifty feet of a road, and not to fire across a road, he failed to control his emotions and did so anyway.

Weed also argues that Crowe was taught not to take an over-the-hill shot. Crowe admitted to firing even though there was a change in the topography and the bases of the trees to the east were no longer visible. Although Crowe obtained permission to hunt to the north of the road, he had no permission to hunt on the land where he shot the victim. Also, Crowe admitted that the vehicles parked near the victim's location would have been visible from his driveway and as he drove down the road.

Weed further argues that Crowe was taught not to shoot without a safe backdrop, and it is obvious that he did not have a safe backdrop because he shot someone. Weed contends that all the evidence is contrary to Crowe's assertion that he had a clear shot on flat terrain.

Weed's arguments are essentially ones of fact, not of law. As an appellate court, we may not substitute our judgment of the facts for that of the jury. Although Weed's arguments would support a finding of negligence, here the jury drew the opposite conclusions. *Cf.* ***Macherey v. Home Ins. Co.,*** 184 Wis.2d 1, 7-8, 516 N.W.2d 434, 436 (Ct. App. 1994) (When more than one reasonable inference may be drawn from the evidence this court must accept the inference drawn by the jury.). The jury heard all three defendants testify that they had a clear open shot on relatively flat terrain with the woods as a backdrop. The warden testified that he could not see the area where Weed was shot from the location the defendants stood. This testimony is not incredible as a matter of law. *Cf.* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975) (To be incredible as a matter of law, the testimony must be patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts.). There was no testimony offered that a prudent hunter shooting an 8 mm Mauser could reasonably foresee that the trajectory of his bullet would fall below his line of sight within 600 yards. Because there was not "such a complete failure of proof that the verdict must have been based on speculation[,]" we must sustain it on appeal. ***Finley v. Culligan,*** 201 Wis.2d 611, 631, 548 N.W.2d 854, 862 (Ct. App. 1996).

Next, Weed argues that he is entitled to judgment notwithstanding the verdict on questions 2, 3, 4 and 5.[2] These questions inquired as to causation, whether Anderson or Boettcher acted in concert with Crowe, and as to the apportionment of negligence. Because we sustained the jury's finding of no negligence on the part of Crowe, the dispositive issue, we need not address these

[2] The verdict inquired as follows:

1. Was Jesse J. Crowe negligent?

   ANSWER: (yes or no) no

2. Answer this question only if the answer to question No. 1 is yes:

   Was his negligence a direct cause of the accident in which Plaintiff, Douglas M. Weed, was injured?

   ANSWER: (yes or no) _____

   Answer this question only if you have answered "yes" to Question No. 2:

3. Did Steven P. Anderson act in concert with Jesse J. Crowe?

   ANSWER: (yes or no) _____

   Answer this question only if you have answered "yes" to Question No. 2

4. Did Fred B. Boettcher act in concert with Jesse J. Crowe?

   ANSWER (yes or not [sic]) _____

5. If you answered question 2 "yes" and questions 3 and/or 4 "yes", then answer the following question. Taking the negligence or fault of all three defendants to equal 100%, what is the percentage of fault for each such party?

   Steven P. Anderson _____

   Jesse J. Crowe _____

   Fred B. Boettcher _____

nondispositive issues. ***Sinai Samaritan Med. Ctr. v. McCabe***, 197 Wis.2d 709, 714 n.4, 541 N.W.2d 190, 192 n.4 (Ct. App. 1995).

Next, Weed argues that the trial court made erroneous evidentiary rulings. The trial court granted Anderson's motion in limine barring Fellrath's testimony that: "I'm just going to say that a deer, running out in that corn field at that point where we are looking here like, say, where I believe those deer ran—I found what I believe to be fresh deer tracks—I personally wouldn't shoot at it. That's just me."

Fellrath's personal opinion does not meet the criteria necessary for rendering an expert opinion. *See* § 907.02, STATS. Also, it is undisputed that hunter safety rules are designed for the general public to be able to understand. As a result, it was within the trial court's discretion to conclude that if offered to explain hunter safety rules, the proffered testimony was not technical or specialized in a way that would assist the jury in determining the issue at hand. *See* ***id.*** In any event, Weed was permitted to inquire of Anderson, Boettcher and Crowe as to the requirements of hunter safety rules. The court received into evidence portions of the hunter safety manual. As a result, the court's refusal to admit expert testimony to explain hunter safety rules did not prejudice Weed. Section 805.18, STATS.

However, Weed argues that Fellrath investigated the accident and "in his report rendered an opinion that this was a preventable accident and that the Defendants violated safe hunting practices by not being sure beyond their target and not having a safe backdrop."[3] The record fails to suggest that Weed offered

[3] Also, Weeds does not cite to any portion of the transcript indicating that a question was put to Fellrath whether it was a preventable accident or a reasonably safe shot.

this argument to the trial court. The record discloses that Weed's counsel argued: "And I just think that this is a case that does lend itself to expertise and Warden Fellrath is clearly an expert." The trial court responded that Fellrath would likely qualify as an expert with regard to some hunter safety rules, but "this is not an issue under § 907.02 which requires the assistance of an expert opinion …." Weed's counsel responded that Fellrath had expertise to talk about the range of the rifles, muzzle velocities or how gravity would affect the bullet. He added that opposing counsel claimed that "only the 8 millimeter Mauser could have caused this. That is why I brought it up. If he doesn't intend to argue that, you know, then maybe we don't have an issue here."

To preserve a claim of error in case of a ruling excluding evidence, the substance of the evidence must be made known to the judge by the offer of proof, or must have been apparent from the context of the questions asked. Section 901.03(1)(b), STATS. This record is insufficient to preserve Weed's claim that the trial court erroneously precluded the introduction of Fellrath's expert opinion that the accident was preventable given the terrain and insufficient backdrop. The record fails to reveal that Fellrath's report was offered or that his testimony was offered to prove that the accident was preventable with the exercise of reasonable care. As a result, we are unable to properly review this claim of error. *Cf.* ***State v. Gilles,*** 173 Wis.2d 101, 115, 496 N.W.2d 133, 139 (Ct. App. 1992) (A reviewing court will not address an issue when "the appellant has failed to give the trial court fair notice that it is raising a particular issue and seeks a particular ruling.").

Next, Weed argues that the trial court erroneously precluded testimony of a neighboring farmer that he heard what sounded like a bullet striking his barn at the time Weed was shot. The trial court refused the evidence,

characterizing it as "speculation" that the bullet came from one of the defendants' guns. We conclude that the proffered evidence lacks the necessary foundation to connect it to one of the defendants. As a result, the court reasonably excluded the testimony.

Next, Weed argues that the trial court erroneously instructed the jury that it could not consider Crowe's firing over a roadway contrary to hunting regulations as causal negligence, and that the issue of causal negligence is a jury question. *See* ***Olson v. Ratzel,*** 89 Wis.2d 227, 241-42, 278 N.W.2d 238, 245 (Ct. App. 1979). We conclude that because Weed is not within the class of persons the regulation is designed to protect, the violation is not to be considered as determinative of the standard of reasonable care. Therefore, although the trial court's instruction reflects confusion addressed in ***Blanchard v. Terpstra,*** 37 Wis.2d 292, 155 N.W.2d 156 (1967), the instruction is not grounds for reversal. The court instructed:

> You are further instructed that in determining whether … Jesse Crowe was negligent, you cannot consider his conduct in firing his rifle over or near a roadway. As a matter of law, the injuries of Douglas Weed were not caused by Jesse Crowe firing his rifle over or near a roadway and, therefore you cannot conclude that such conduct constitutes negligence on Jesse Crowe's part.

The parties do not dispute that firing over a roadway violated hunting regulations designed to protect those using roadways.

> The violation of a safety statute is ordinary negligence per se. If a party violates a statute but it is determined that the plaintiff was not within the class of persons that the statute was designed to protect, the violation is not to be considered as determinative of the standard of reasonable care in a negligence action.

Id. at 298 n.1, 155 N.W.2d at 158 n.1 (citations omitted).

Blanchard explains that confusion often leads some courts to conclude that the violation of the statute is not the proximate cause of the plaintiff's injury.

> In such a statement there is an obvious fallacy. In all such cases the act of the defendant has clearly caused the damage. … What the statute does, or does not do, is to condition the legality of the act, and to qualify or characterize it as negligent. Upon cause and effect, it has no bearing at all.

Id. As a result, "the standards of the statute will not be adopted as setting a standard of reasonable care in this instance, in that its purpose was to protect another interest than the one invaded." ***Id.***

It was undisputed that Crowe shot across the road contrary to hunting regulations. It was also undisputed that Weed was shot approximately 1,700 feet from the road. There is no showing that the existence of the roadway played any part in Weed's injuries. Consequently, it would have been more appropriate to instruct that Crowe's violation of the hunting regulations that prohibits shooting across or near roadways "is not to be considered as determinative of the standard of reasonable care …." *See* ***id.*** Nevertheless, we affirm the trial court's conclusion that no liability is to be imposed upon Crowe for his violation of the regulation prohibiting shooting near or across the roadway. As a result, the trial court's instruction does not constitute reversible error.

Weed contends, however, that the jury should have been permitted to consider the violation of the safety regulation in its consideration of common law negligence. Because there is no suggestion that there is a connection between

the existence of the roadway and the harm suffered, the trial court was entitled to instruct the jury accordingly. *See* ***Olson,*** 89 Wis.2d at 244, 278 N.W.2d at 246-47.

Next, Weed argues that the trial court erroneously denied him summary judgment. An appeal of a summary judgment ruling raises an issue of law that we review de novo by employing the same standards as the trial court. ***Brownelli v. McCaughtry,*** 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). The court does not decide issues of fact on summary judgment motions, only whether there is a genuine issue of fact in dispute. ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment. ***Id.***

Weed argues that there are compelling reasons to impose a concerted action theory of liability on summary judgment. *See* ***Ogle v. Avina,*** 33 Wis.2d 125, 134, 146 N.W.2d 422, 426 (1966). Weed argues that a summary judgment determining Crowe to be causally negligent as a matter of law should be entered and requests that Weed be granted a new trial on the issues of Anderson's and Boettcher's concert of action liability, causal negligence and apportionment of negligence.

Whether Crowe acted with reasonable care in identifying his target and beyond presented a factual issue for the jury. Because conflicting inferences could have been reasonably drawn from the proofs before the court, the court properly denied Weed's motion for summary judgment.

Next, Weed argues that the trial court's failure to find Crowe guilty of trespass as a matter of law constitutes plain error. This issue was not raised on the special verdict form and was presented to the trial court for the first time on

post-verdict motions. The causal relationship between the trespass and the injury required fact-finding for the jury. Because the issue was not submitted to the jury, we conclude the issue was not preserved for appeal. ***Estate of Plautz v. Time Ins.,*** 189 Wis.2d 136, 149, 525 N.W.2d 342, 347-48 (Ct. App. 1994); § 805.13(3), STATS.

Finally, Weed argues that he is entitled to a new trial because the real issues in controversy have not been tried and that it is probable justice has miscarried. He argues that due to trial court error, we should exercise our powers of discretionary reversal pursuant to § 752.35, STATS. Upon the record before us, we decline to exercise our powers of discretionary reversal.

By the Court.—Judgment affirmed.

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