COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-2633

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

PATRICK HAGENBUCHER AND SHANNON HAGENBUCHER,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY AND COUNTY OF MARATHON,

DEFENDANTS-RESPONDENTS,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Patrick and Shannon Hagenbucher appeal a judgment dismissing their personal injury action against Marathon County and its insurer. Patrick was injured when his pickup truck struck a windrow the County's road construction crew created. The jury found that the County was not negligent and that $3,505.25 would compensate Patrick for his past and future medical expenses, pain, suffering and disability. The Hagenbuchers argue that the court improperly instructed the jury on liability issues, that the evidence does not support the jury's findings on negligence and damages and that they are entitled to a new trial in the interest of justice. We conclude that the court improperly instructed the jury on liability issues but that there is no basis for reversing the damage awards. Therefore, we remand for a new trial on liability only.

During the road maintenance, lanes of travel were left open in both directions. Each end of the construction zone was marked with signs reading "road closed to through traffic" and "road work one mile." Barricades at the start of the construction zone had been in place for seven months at the time of the accident. Throughout the construction, people continued using the road regardless whether they were local traffic, according to the road crew supervisor and a State Patrol sergeant. At the time of the accident, the road crew had gone to lunch. They erected no signs or warnings instructing motorists to reduce speed, and they put up no barricades, channeling devices or cones at the ends of the windrow that could have alerted drivers to the danger.

Hagenbucher had driven his pickup truck through the area earlier in the day and was using the road to go to lunch with two coworkers. He testified that he was unable to see the windrow, six hundred feet long, twelve to fourteen feet wide, and three to four feet high, because it blended with the existing granite surface. One of his passengers testified that he was also watching the road and

failed to see the windrow. Within approximately twenty minutes, two other vehicles crashed into the other end of the windrow, including the sheriff's deputy who was dispatched to investigate the accident and told by his dispatcher that the accident involved a pile of dirt in the roadway.

The trial court improperly exercised its discretion when it denied Hagenbucher's request to instruct the jury on the County's duty to maintain the highway to be reasonably safe for anticipated public use. When a party timely requests a correct instruction on a material point and there is evidence to support the instruction, it is error to refuse the instruction unless an equivalent instruction adequately covers the law. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 24, 531 N.W.2d 597, 603 (1995); ***Sambs v. City of Brookfield***, 66 Wis.2d 296, 304, 224 N.W.2d 582, 587 (1975).

The Hagenbuchers' requested the court to read WIS J I—CIVIL 8035 or a similar instruction to alert the jury that the County had a duty to construct and maintain the highway in a reasonable and safe condition for the traveling public and that a highway is defective when it is not maintained to be reasonably safe for anticipated public use. The trial court refused to read the jury that instruction, contending that the general negligence instructions adequately covered the County's duties. The general negligence instruction, however, did not adequately inform the jury regarding the Hagenbucher's theory that the construction area did not include appropriate warnings of the danger. In motions after verdict, the trial court indicated that it thought it had given an instruction on the County's failure to give warning. It had not.

The trial court ruled that WIS J I—CIVIL 8035 was not appropriate because a highway under construction is not defective. The court expressed

concern that the jury might believe that putting the windrow in the road was in and of itself negligent. The Hagenbuchers' theory involves the County's alleged violations of § 81.15, STATS. In ***Heritage Mutual Ins. v. Sheboygan County***, 18 Wis.2d 166, 169, 118 N.W.2d 118, 120 (1962), the court held that the absence of warning signs during construction renders a highway unsafe and constitutes an actionable defect under § 81.15. Because the trial court failed to instruct the jury on the County's duty, the liability portion of the trial must be retried.

The court also refused to instruct the jury on the effect of camouflaged defects on a driver's duty to keep a careful lookout. WIS J I—CIVIL 1056. Instead, the court read J I—CIVIL 1070, the general lookout instruction, and J I—CIVIL 1320, which relates the effect of camouflage to a driver's duty to maintain appropriate speed. The trial court concluded that it was not necessary to instruct the jury twice as to the effect of camouflage.

The camouflage instruction as it relates to speed specifically applies to "this rule," referring to maintaining appropriate speed. The court instructed the jury at length on the driver's lookout duty including the driver's negligence for failing to see an object in plain sight, but never informed the jury that a driver using ordinary care as to lookout might not see an object until it is too late when it blends with the road so that it cannot be seen. The camouflage instruction given, relating to speed, does not adequately inform the jury on lookout. While the court can reasonably choose to give the camouflage instruction only once, the instruction must then be modified to specifically alert the jury to the effect of camouflage on both speed and lookout duties.

Sufficient evidence supports the jury's findings on damages. We must sustain the jury's verdict if it is supported by any credible evidence. *See*

Nelson v. Travelers Ins. Co., 80 Wis.2d 272, 282, 259 N.W.2d 48, 52 (1977). After the accident, Hagenbucher went home and later drove himself to a clinic where X-rays disclosed no injury. His personal physician treated him for one month. When Hagenbucher had no further complaints, his physician discharged him "without any disability." He began landscaping work two months later at the start of the landscaping season and continued for an additional month before seeing another physician. He saw that physician on the same day he filed the complaint in this action. He continued performing landscaping work until the end of the landscaping season at which point he again sought medical treatment. The verdict shows that the jury compensated him for his initial treatment with his regular physician and found that any other claims of injury or disability arising out of this accident were not credible. Construing the evidence in the light most favorable to the verdict, *see* § 805.14, STATS., the trial court properly sustained the verdict as to damages.

The Hagenbuchers have not established that the errors instructing the jury on liability affected the damage claims. The court instructed the jury to answer the questions on damages regardless of the answers to the liability questions. The court specifically instructed the jury not to make any deductions from the damage awards "because of a doubt in your minds as to the liability of any one of the parties to this action." The jury is presumed to follow the court's instructions. *See* ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 457 n.20, 405 N.W.2d 354, 378 n.20 (Ct. App. 1987). The errors made in the liability portion of the trial do not taint the damage award. They were not inflammatory in nature and are wholly unrelated to Hagenbucher's injuries or his credibility. Issues relating to damages were fully and fairly tried, and there is no basis for granting a new trial

on damages in the interest of justice. *See* ***Neider v. Spoehr***, 41 Wis.2d 610, 623, 165 N.W.2d 171, 178 (1969).

We conclude that neither party has entirely prevailed on appeal. Therefore, we will award no costs for this appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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