COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2301

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

ROBERT J. ROHR,

PLAINTIFF-APPELLANT,

V.

PEKIN INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

AND JOHN ALDEN LIFE INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI and MARY KAY WAGNER-MALLOY, Judges. *Reversed and cause remanded with directions.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Robert J. Rohr was injured when he was burning brush at rental property owned by his father, Neal Rohr. Neal was insured by Pekin Insurance Company. Robert appeals from the judgment dismissing his action against Pekin Insurance. He argues that the trial court erroneously exercised its discretion in granting a new trial on liability and that it was error to direct the verdict upon retrial. We agree that a new trial was not required and need not address any issues pertaining to the second trial. We reverse the judgment and direct the trial court to enter judgment in Rohr's favor on the jury's verdict from the first trial.[1]

¶2 Neal asked Robert to assist a hired laborer in clearing and gathering brush at the rental property. Although Neal met Robert at the property, he was not present when Robert was working on the property. Robert was to burn the brush. He started the fire by using charcoal starter fluid found in the basement of the home. Robert sustained second-degree burns when a fireball erupted from the brush pile as he threw a match on the pile.

¶3 The jury verdict found that both Neal and Robert were negligent in causing Robert's injuries. Negligence was apportioned 65% to Neal and 35% to Robert. Damages for past and future pain, suffering and disability were determined to be $100,000. After the verdict, Pekin Insurance moved for a ruling that the evidence was insufficient to support the finding that Neal was negligent, for judgment notwithstanding the verdict, and, in the alternative, for a new trial in the interests of justice, or remittitur of damages. The trial court concluded that

[1] The first trial commenced on November 24, 1997. Judge David M. Bastianelli presided over the first trial and granted a new trial on motions after the verdict. The second trial commenced on May 10, 1999, before Judge Mary Kay Wagner-Malloy.

there was sufficient evidence to support the jury's verdict. However, the trial court determined that the failure to instruct the jury on the duty of a landowner required a new trial in the interests of justice on liability.[2] *See* WIS. STAT. § 805.15(1) (1997-98).[3] The court's concern was that evidence that Neal could have rented a dumpster for $250 to dispose of the brush (the "dumpster evidence") was an alternative theory of liability different from negligence and made the "landowner" instruction necessary.[4]

¶4 Under WIS. STAT. § 805.15, the trial court has authority to grant a new trial when it concludes that the real controversy has not been fully tried.[5] *See* ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991). The trial court's decision to grant a new trial is discretionary. *See* ***Totsky v. Riteway Bus Serv., Inc.***, 220 Wis. 2d 889, 898, 584 N.W.2d 188 (Ct. App. 1998), *aff'd*, 2000 WI 29, 233 Wis. 2d 371, 607 N.W.2d 637. It will not be disturbed absent an erroneous exercise of discretion. *See* ***Douglas-Hanson Co., Inc. v. BF Goodrich Co.***, 229 Wis. 2d 132, 150, 598 N.W.2d 262 (Ct. App. 1999), *aff'd*, 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621. If the trial court grounds its decision upon a mistaken view of the evidence or an erroneous view of the law, it has erroneously exercised its discretion. *See* ***Totsky***, 220 Wis. 2d at 898. Moreover, when a procedural error is the predicate for granting a new trial, we evaluate whether the

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[2] Robert petitioned this court for leave to appeal the nonfinal order granting a new trial on liability only. The petition was denied on March 20, 1998.

[3] All references to the Wisconsin Statutes are to the 1997-98 version.

[4] The instruction the trial court referred to is WIS JI—CIVIL 8020. The trial court explained that the instruction would have informed the jury that a landowner is not the insurer of the safety of persons on the premises.

[5] Even unobjected to error may be rectified by the trial court.

alleged error affected the substantial rights of the party seeking to secure a new trial. *See* ***Douglas-Hanson***, 229 Wis. 2d at 150-51.

¶5 Robert argues that the trial court based its decision on the erroneous determination that the dumpster evidence was inadmissible. The trial court was concerned about the dumpster evidence because it believed that such evidence was relevant only to a safe-place claim and this was not a safe-place action.[6] We conclude that the dumpster evidence was admissible even in the absence of a safe-place cause of action.

¶6 Negligence can be found in creating unreasonable risk of injury.

> A person fails to exercise ordinary care when, without intending to do any harm, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject the person of another to an unreasonable risk of injury.

Morden v. Continental AG, 2000 WI 51, ¶53, ___ Wis. 2d ___, 611 N.W.2d 659. Thus, the jury is permitted to weigh the risk of harm against the utility of the act. *See* ***Brodde v. Grosenick***, 14 Wis. 2d 341, 350, 111 N.W.2d 165 (1961). Evidence that Neal had alternative methods of brush disposal bears on the jury's determination about whether Neal reasonably could have done something to prevent the harm. *See* ***Morden***, 2000 WI 51 at ¶56. The dumpster evidence was

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[6] A safe-place claim is based on WIS. STAT. § 101.11(1) which provides that

> [e]very employer ... shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters.

relevant to the claim that Neal breached his duty of ordinary care. The trial court proceeded on an erroneous view of the law in determining that the dumpster evidence was inadmissible on Robert's negligence claim.

¶7 Having concluded that the dumpster evidence was admissible, the landowner instruction was not necessary to temper what the trial court perceived to be the safe-place implications of that evidence. Even testing the prejudicial effect of the failure to give the requested instruction independent of the dumpster evidence, we conclude that it was not error supporting a new trial. We look to whether as a whole the jury was fully and fairly informed of the applicable principles of law and test the prejudicial effect of the absent instruction by determining whether the jury was probably misled. *See* ***Douglas-Hanson***, 229 Wis. 2d at 154. As the trial court noted when it denied the requested instruction, the landowner instruction is crafted to address defective conditions of the land itself. The instruction would have not added anything more to the ordinary negligence instruction. The jury was not misled for not having the negligence standards repeated.

¶8 We conclude that the trial court erroneously exercised its discretion in ordering a new trial on the issue of liability. Pekin Insurance does not renew its argument on appeal that the jury's verdict was not supported by the evidence. Even if it did, we afford special deference to the jury's verdict because the trial court approved it. *See* ***Morden***, 2000 WI 51 at ¶40. The second trial was not necessary and we need not address any of the issues raised with respect to the

second trial.[7] The judgment is reversed and on remand the trial court shall enter judgment in Robert's favor on the jury's verdict from the first trial.[8]

By the Court.—Judgment reversed and cause remanded with directions.

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

[7] Pekin Insurance argues that the trial court erred in failing to grant its motion for summary judgment. By relying only on "all of the reasons set forth above," the argument is underdeveloped and we need not specifically address it. *See* ***Calaway v. Brown County***, 202 Wis. 2d 736, 750-51, 553 N.W.2d 809 (Ct. App. 1996). It is sufficient to note that a question of fact existed about the level of direction Neal gave Robert, and therefore, summary judgment was inappropriate.

[8] Because the judgment is reversed, the taxation of costs in favor of Pekin Insurance is also reversed and we need not address Robert's claim that the trial court failed to entertain his objections to the taxation of costs.