COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2005

Cornelia G. Clark
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. 2004AP2668 Cir. Ct. No. 2001CV99

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

STEVEN C. LAMPHIER,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

RONALD FERBER,

DEFENDANT-THIRD-PARTY

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

FARMINGTON MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT-CROSS-APPELLANT,

V.

COLONIAL PENN INSURANCE COMPANY A FOREIGN INSURANCE CORPORATION,

THIRD-PARTY DEFENDANT.

APPEAL and CROSS-APPEALS from a judgment and an order of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 HOOVER, P.J. Steven Lamphier appeals a judgment dismissing his complaint and awarding costs to the defendants, and an order denying his motion for a new trial. He argues there was insufficient evidence to support the jury's apportionment of negligence and its damage awards; the trial court erred by determining he had already been fully compensated by a pretrial settlement; the court erred by declining to award him costs; and because of the forgoing errors, he is entitled to a new trial in the interests of justice. Ronald Ferber and American Family Mutual Insurance Company cross-appeal the portion of the verdict holding Ferber negligent, arguing Lamphier failed to meet his burden of proof. American Family also cross-appeals the court's determination that its policy issued to Ferber provides coverage in this case. We affirm the judgment and order in all respects.

Background

¶2 Ferber owns a summer home in Chicog. Elroy Undahl is his neighbor. Ferber's property had no water hookup and he decided he wanted to install a well. He had experience installing at least one other well. Elroy and his son, Darryl, agreed to help Ferber with his well project. The Undahls had prior

experience with at least three wells. Lamphier was visiting the Undahls—Elroy is his father-in-law—at the time they were working on Ferber's well, and he also agreed to help with the installation.

¶3 As part of the installation, Elroy suggested a setup involving a weight and a pulley designed to drive some pipes into the ground and down to the water table. The group constructed a tripod to house the pulley system, using cut trees as the legs and pipes to connect the legs. The pulley system involved a nylon rope, a 130-pound weight, and, initially, a lawn tractor as the mechanical force used to wind the rope and lift the weight.

¶4 The lawn tractor did not work as expected, and they changed to a truck. The truck was put in position, jacked up, and a rear tire was removed. The Undahls created a fused metal double wheel to install where the tire had been, and they planned to use their creation for winding the rope to lift the weight.

¶5 With the tripod and truck set up, the parties began working. Lamphier sat in the truck to put it in gear so the wheel would turn. At some point, the rope became bound up on the wheel and, rather than controlling weight, began dragging the tripod, ultimately pulling the tripod down on Lamphier. He suffered multiple injuries, including a head injury and fractures to his right ankle, left arm, spine, and ribs.

¶6 Lamphier sued Ferber, along with Ferber's insurers. Colonial Penn and American Family provided auto insurance, and Farmington provided homeowner's insurance. Prior to trial, Colonial Penn paid Lamphier its policy limits of $100,000 in exchange for a release. Following a jury trial, the jury found Lamphier and Ferber each 40% negligent and the Undahls—who were not parties to the suit—each 10% negligent. The jury awarded approximately $112,000 in

damages to Lamphier for past and future medical expenses, past and future wage loss, and past and future pain and suffering. Reduced for the contributory negligence, Lamphier's award was approximately $67,000.

¶7 There were multiple motions after verdict. The remaining defendants sought judgment entered on their behalf, arguing the Colonial Penn payment satisfied their obligations. Lamphier sought changes to the jury verdict, arguing its damage awards were insufficient or, in the alternative, sought a new trial in the interests of justice.

¶8 The trial court agreed with Ferber and his insurers that Colonial Penn's payment satisfied any judgment against them. It then dismissed the complaint and granted costs to Ferber, Farmington, and American Family, denying Lamphier's request for costs. Lamphier appeals. Ferber and American Family cross-appeal.

Discussion

I. Sufficiency of the Evidence

¶9 Our review of a jury verdict is narrow. ***Hoffmann v. Wisconsin Elec. Power Co.***, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. We view the evidence in the light most favorable to the verdict and sustain the verdict if there is any credible evidence supporting it, even if there is evidence supporting a different verdict. ***Id.*** The credibility of witnesses and the weight assigned to their testimony is the province of the jury, not this court. ***Id.***

A. Allocation of Liability

¶10 "Generally, the apportionment of negligence is for the jury and will not be upset except where it is manifest as a matter of law that the allocation is unreasonably disproportionate." ***Schuh v. Fox River Tractor Co.***, 63 Wis. 2d 728, 744, 218 N.W.2d 279 (1974).

¶11 Lamphier contends there is insufficient evidence to support the 40% allocation of liability to him. He takes a piecemeal approach to his argument, listing all the evidence he thinks demonstrates Ferber's negligence while minimizing his own participation. We conclude, however, there was sufficient evidence from which the jury could allocate liability to him.[1]

¶12 Lamphier essentially contends that Ferber was negligent in setting up the tripod and the pulley apparatus, but Lamphier himself was an active participant in almost every step of the process. During the tripod setup, Lamphier drilled placement holes in the legs for the connectors, then installed the pipes used to connect the legs. He helped raise the tripod into position. Then, he helped install the Undahls' fused wheel onto the pickup truck.

¶13 Moreover, when the tripod collapsed, it was Lamphier who was operating the power source. He admitted he was not watching what was going on outside the truck very carefully. At least one person yelled at him to stop the power before the tripod fell, and Lamphier could have shifted the truck to neutral or turned it off to stop the tripod from dragging. Only Lamphier could have

[1] American Family provides a synopsis of all the evidence on which the jury could have relied. Lamphier, in his reply, never refutes American Family's analysis.

stopped the power source but instead, he actually got out of the truck. Ferber suggested at trial—and the jury could have inferred—that had Lamphier been paying attention, he would have been able to cut the power source in time to stop the tripod's collapse. Thus, to the extent Lamphier alleges negligence in the construction, setup, and operation of the tripod and pulley system, he had an integral part in each.

¶14 Lamphier also challenges the jury's allocation of negligence to the Undahls. He argues the evidence does not disclose any actions by the Undahls that would have caused the accident, claming that neither had anything to do with the binding of the rope or the toppling of the tripod. He also appears to complain it was inappropriate to add them when they were not parties to the action. However,

> when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.
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> ….
>
> [That is,] the apportionment must include all whose negligence may have contributed to the arising of the cause of action.

Connar v. West Shore Equip., 68 Wis. 2d 42, 44-45, 227 N.W.2d 660 (1975).

¶15 There was evidence from which the jury could attribute some negligence to the Undahls. Elroy and Darryl had worked on at least three wells prior to Ferber's. Elroy promised to give advice and suggested the weight and pulley system. He oversaw the construction of the tripod and created the fused wheel Lamphier later installed on the truck. Darryl helped set up the tripod and

assisted Elroy in creating the wheel for the pulley system. Thus, to the extent Lamphier argues there were problems in the tripod or pulley designs, the Undahls were the creators of the designs.

B. Damages

¶16 As with a jury verdict generally, when we review a damage award, "we must consider evidence most favorable to the award, and sustain it if there is any credible evidence to support it." ***Betterman v. Fleming Cos.***, 2004 WI App 44, ¶29, 271 Wis. 2d 193, 677 N.W.2d 673. Lamphier argues the damage awards were "perverse and were the products of passion and prejudice." However, he really only challenges the evidence supporting the damage verdicts, never explaining why they are perverse and prejudicial but merely complaining that they are.

¶17 The award for past medical expenses was answered by the court as a result of the parties' stipulation. The award for future medical expenses was based on testimony from experts on both sides regarding a procedure to Lamphier's ankle that he would likely need. The award for past wages was based on a defense expert's testimony. The award for future wages was based on the time off Lamphier would need for the ankle procedure. The award for past pain and suffering is not challenged. Lamphier's biggest complaint is with the award for future pain and suffering. Lamphier contends it is too low, given his "serious and permanent injuries."

¶18 Lamphier complained of many maladies including neck and back pain, recurrent headaches, and sleeplessness as a result of the tripod falling on him. The defense expert admitted Lamphier likely had some permanent disability to the right ankle and left arm. However, Lamphier's wife testified he made a

rapid recovery. When, after his recovery, Lamphier went to renew his commercial driver's license (CDL)—something subject to federal regulations—he indicated he had no impairment to any limbs. His treating physician released him for work with no physical limitations. And, Lamphier has a medical history indicating the same sorts of complaints and injuries—including headaches, neck pain, back pain, and a right ankle fracture—predating the accident by several years and in one instance by more than twenty years.

¶19 The jury could reasonably decline to attribute future pain and suffering to the tripod accident given Lamphier's extensive medical history and his disavowal on his CDL application of any lasting impact. As far as exact sums for certain elements, such as past wages, it is clear that the jury simply chose to believe the defense experts. Credibility determinations and discrepancies in testimony among witnesses are for the jury to resolve. ***Hoffman***, 262 Wis. 2d 264, ¶9. None of the figures in the damage award are patently incredible and there is sufficient evidence in the record to support the awards. They will not be disturbed.[2]

II. The Colonial Penn Payment

¶20 The jury awarded approximately $112,000 to Lamphier which, following the reduction, totaled about $67,000. Because Lamphier had already received $100,000 from Colonial Penn, Ferber and the other insurers sought to have the case dismissed. The court agreed. Lamphier contends this was error

[2] Because there is sufficient evidence to support the jury's apportionment of negligence and its damage award, the court did not erronoeously exercise its discretion when it declined to grant a new trial in the interests of justice. *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431-32, 509 N.W.2d 75 (Ct. App. 1993).

because the court never determined how much of the total verdict each insurance company was proportionally responsible for and, in any event, he argues the collateral source rule applies.

¶21 The collateral source rule does not apply. Generally, "the collateral source rule provides that a tortfeasor's liability to an injured individual is not reduced because the individual received benefits or payments from other sources." ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶7, 235 Wis. 2d 678, 611 N.W.2d 764. That is, voluntary payments to an injured person inure to his benefit, not the tortfeasor's. ***Papenfus v. Shell Oil Co.***, 254 Wis. 233, 239, 35 N.W.2d 920 (1949).

¶22 However, while the injured party is entitled to full compensation for his injuries, he is entitled to only one compensation. ***Haase v. Employers Mut. Liab. Ins. Co.***, 250 Wis. 422, 432, 27 N.W.2d 468 (1947). Thus, when the injured person recovers full compensation from one of multiple joint tortfeasors, that compensation bars recovery from the other tortfeasors. ***Id.*** In other words, payments made on behalf of a tortfeasor are simply not collateral sources. *See* ***Papenfus***, 254 Wis. at 239-40. Thus, the court correctly determined Lamphier had been fully compensated by Colonial Penn because that company proffered $100,000 and the verdict entitled Lamphier to only $67,000. Thus, it is irrelevant which insurance companies may or may not be "more responsible" because Colonial Penn's settlement covered all the defendants' liability.

III. Costs

¶23 Lamphier contends he is entitled to costs under WIS. STAT. § 814.01 as the prevailing party.[3] The court disagreed, instead awarding the defendants costs under WIS. STAT. § 814.03. Lamphier argues this was error because the defendants did not prevail.

¶24 WISCONSIN STAT. § 814.01(1) provides that "costs shall be allowed of course to the plaintiff upon recovery." WISCONSIN STAT. § 814.03(1) provides that if the plaintiff is not entitled to costs under § 814.01, "the defendant shall be allowed costs." Section 814.03 is mandatory. ***Taylor v. St. Croix Chippewa***, 229 Wis. 2d 688, 695-96, 599 N.W.2d 924 (Ct. App. 1999).

¶25 Lamphier argues that he was awarded $67,000 from the jury, which is a recovery and, therefore, he is entitled to costs. Recovery "means judgment in the cost statute and not verdict." ***Hartwig v. Eliason***, 164 Wis. 331, 332, 159 N.W. 943 (1916). Particularly when there are counterclaims, "there are never two recoveries but only one, namely, the difference between the sums allowed by the jury or the court to the respective parties." ***Id.*** In ***Hartwig***, the jury awarded the same amount to Hartwig on his claim as it did to Eliason on his counterclaim. ***Id.*** Thus, because the amounts offset each other, and the ultimate judgment was therefore $0 to either party, Hartwig had no recovery, entitling Eliason to costs. ***Id.***

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶26 The same principle applies in this case. Although Lamphier won a verdict on liability, the judgment entered is one of dismissal—or $0—because of Colonial Penn's payment. Lamphier recovers nothing on the judgment in this case and cannot fulfill the requirements of WIS. STAT. § 814.01. Therefore, the defendants are entitled to costs under WIS. STAT. § 814.03. Additionally, § 814.03 does not use the words "prevail" or "recovery." Rather, it simply states if the plaintiff is not entitled to costs, the defendant is.

IV. Cross-Appeal

¶27 On the cross-appeal, Ferber and American Family argue that Lamphier failed to meet his burden of proof. American Family further argues that its insurance policy does not apply. We need not reach the cross-appeal. Although the jury did find for Lamphier, the judgment in this case ultimately dismissed the complaint against all defendants. Only dispositive issues need be addressed. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.