COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2041 **Cir. Ct. No. 2002CV1149**

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

PAUL D. WEPKING AND SHARON WEPKING,

PLAINTIFFS-APPELLANTS,

V.

M.B.J. PROPERTIES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 NETTESHEIM, J. Paul D. Wepking and Sharon Wepking (the Wepkings) appeal from a judgment dismissing their complaint against M.B.J.

Properties, Inc. (MBJ). The Wepkings' complaint alleged that MBJ had created a nuisance by diverting water onto the Wepkings' property as the result of MBJ's development of an adjoining subdivision. The matter proceeded to a jury trial, but the trial court dismissed the complaint at the close of the Wepkings' evidence.

¶2 On appeal, the Wepkings raise three arguments: (1) the trial court erroneously rejected one of their witnesses as an expert witness; (2) their evidence was sufficient to survive MJS's motion for dismissal; and (3) the trial court erroneously rejected their posttrial motion to supplement the record. We reject the Wepkings' arguments and affirm the judgment of dismissal and the order denying posttrial relief.

BACKGROUND

¶3 The Wepkings' complaint alleged the following facts. MBJ developed a subdivision on lands adjacent to the Wepkings' property. As part of the development, MBJ constructed a drainage facility that "altered the natural characteristics of the property and changed its condition so as to interfere with the natural flow of the water." This resulted in surface water flowing onto the Wepkings' property causing repeated flooding. The Wepkings alleged that this condition constituted a nuisance.[1] The Wepkings sought both damages and an injunction. MBJ's answer denied these allegations and its affirmative defense alleged that the subdivision had been constructed in accord with the plans and specifications of the Village of Paddock Lake.

[1] The Wepkings also alleged that the condition constituted a trespass. However, their arguments on appeal are limited to their nuisance claim.

¶4 At the ensuing jury trial, the Wepkings presented two witnesses: Sharon Wepking and a retired engineer, Milton Koch. Sharon Wepking's testimony established the following. The Wepkings had lived on their property for forty years. The subdivision area used to be a farm field that drained onto the Wepkings' property but did not cause flooding. Prior to the development of the subdivision, the Wepkings could use their back yard for gardening and recreation. After the development, the property is "continually flooded" after a rain. MBJ's grading of the subdivision changed the flow of the water. MBJ's drainage plan included a pond that was supposed to hold water, but does not. The discharge pipe from the pond discharges water directly onto the Wepkings' property. Paul Wepking had dug a trench in an effort to deal with the runoff. This helped "some … but not a lot."

¶5 The Wepkings also presented Koch as an expert witness. We will discuss Koch's testimony in detail when we address the Wepkings' argument that the trial court erroneously rejected him as an expert witness.

¶6 At the conclusion of Sharon Wepking's and Koch's testimony, the Wepkings rested their case. MBJ then moved for dismissal arguing that the Wepkings had failed to demonstrate any negligence in support of their nuisance claim. The Wepkings responded that the "before and after" condition testified to by both Sharon Wepking and Koch was sufficient evidence to survive the motion to dismiss. The trial court disagreed. While sympathetic to the Wepkings' predicament, the court held that they had failed to present any evidence showing that MBJ's conduct was negligent. The trial court granted MBJ's motion to dismiss. The Wepkings appeal.

DISCUSSION

Koch As An Expert Witness

¶7 We first address the Wepkings' argument that the trial court erred by refusing to accept Koch as an expert witness and, instead, permitting Koch to testify only as a lay witness. However, the record of the jury trial does not support this argument.

¶8 Koch testified to his credentials, which included a degree in mechanical engineering. Following this introductory testimony, the Wepkings moved that the trial court accept Koch as an expert witness. MBJ objected. The trial court then personally questioned Koch about his background and his specific expertise on the matter of drainage. Koch replied that a component of mechanical engineering includes hydraulics. The court then inquired of Koch whether he had testified before in this kind of case. Koch replied, "Roughly similar, not exactly the same." The court then ruled on MBJ's objection stating, "*Court will permit him to testify*." (Emphasis added.)

¶9 Koch then proceeded to testify at some length about his inspections of the Wepkings' property and his conclusions. He testified that the Wepkings' complaints were essentially correct. He described the MBJ drainage system, the retention pond, including the sizing of the piping serving the system. He testified that the discharge pipe, which drains from the retention pond and diverts water towards the Wepkings' property, was positioned approximately one foot lower than the computer model prepared by the Village authorities. Finally, Koch testified that the "main pipe" could have been diverted to a different area, eliminating the need for a retention pond.

¶10 We have examined the entire transcript of the jury trial, line by line and question by question. As the above excerpt demonstrates, when MBJ initially objected to Koch's expertise, the trial court, after personally questioning Koch further, *permitted Koch to testify*. The Wepkings do not cite to any portion of the record, and we have located none, where the court rejected Koch as an expert witness or limited his testimony to that of a lay witness as the Wepkings contend.[2] True, the trial court at times expressed some hesitancy about Koch's credentials and at other times sustained some of MBJ's objections to questions put to Koch. But these were rulings based on either a lack of foundation for the particular question, hearsay, or other evidentiary grounds unrelated to his expertise.[3] In summary, the record of the jury trial does not support the premise for the Wepkings' argument.

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[2] We acknowledge that at the posttrial hearing on the Wepkings' motion to supplement the record, the trial court said that it had rejected Koch as an expert witness. However, the court did not have the benefit of a transcript of the jury trial at that proceeding, a matter noted at the outset of the hearing. Moreover, even assuming that Koch did not qualify as an expert, the fact remains that he nonetheless was permitted to give opinion testimony that MBJ's conduct caused the flooding. *See* WIS. STAT. § 907.01 (2003-04), authorizing opinion testimony by a lay witness. However, Koch was never asked whether MBJ's conduct was unreasonable or negligent. The absence of any evidence (expert or otherwise) on this crucial question formed the basis for the trial court's dismissal of the action.

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

[3] For instance, Koch attempted to testify as to certain hearsay statements made to him by the local municipal employees or officials. He also attempted to testify as to the monitoring process of the Village without demonstrating his basis for such knowledge. He also was asked why the Wepkings never had a flooding problem before. In response to MBJ's objection based on lack of foundation, the Wepkings' attorney responded that Koch should be permitted to answer because he "might" have an opinion on the matter. The trial court responded that "might" was not good enough and instructed counsel to rephrase the question.

¶11 We also hold that even if the trial court had rejected Koch's expertise, such error would have been harmless. We say that because, as our ensuing discussion will reveal, the Wepkings were obligated to provide evidence of MBJ's negligence, and none of the questions put to Koch inquired as to that matter. Thus, any error by the trial court in rejecting Koch's expertise about the other matters to which he did testify is of no consequence to the core issue in this case. We also note that the Wepkings never made an offer of proof in response to any objection sustained by the trial court.[4]

Motion to Dismiss at the Close of the Wepkings' Case

¶12 As a separate issue, the Wepkings contend that the trial court erred when it dismissed their complaint at the conclusion of their case pursuant to WIS. STAT. § 805.14(3). As noted, the court dismissed the complaint because the evidence failed to show any negligence on the part of MBJ.

¶13 WISCONSIN STAT. § 805.14(1) provides, "No motion challenging the sufficiency of the evidence as a matter of law to support a verdict … shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inference therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in

[4] WISCONSIN STAT. § 901.03(1)(b) provides that error cannot be predicated on a trial court's exclusion of evidence unless a substantial right of the proponent is affected and the proponent of the evidence either makes the substance of the evidence known to the trial court or the substance was apparent from the context in which the questions were asked. We cannot say from the context of those questions put to Koch to which objections were sustained that the substance of his answers is apparent.

favor of such party."[5] We apply this same test upon review. ***American Family Mut. Ins. Co. v. Dobrzynski***, 88 Wis. 2d 617, 624, 277 N.W.2d 749 (1979). However, in applying this test, we inquire whether the trial court's ruling was "clearly wrong." ***Olfe v. Gordon***, 93 Wis. 2d 173, 186, 286 N.W.2d 573 (1980). We apply this deferential standard of review because "the trial court has such superior advantages for judging of the weight of the testimony and its relevancy and effect that this court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision." ***Id***. (citation omitted). Instead, we may reverse the trial court's ruling "only when the mind is clearly convinced that the conclusion of the trial judge is wrong." ***Id***. (citation omitted). With these principles of review in mind, we move to the merits.

¶14 In ***State v. Deetz***, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), the supreme court abandoned the "common enemy" doctrine and adopted the "reasonable use" doctrine. ***Id***. at 13-24. The "reasonable use" doctrine provides that a person is legally privileged to make "reasonable use" of his or her land, even though the flow of waters is altered thereby and causes some harm to others, but the person incurs liability when his or her harmful interference with the flow of surface waters is unreasonable. ***Id***. at 14. This doctrine is "substantially embodied in sec. 822 of the Restatement (Second) of Torts (1977)." *See* ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 138, 384 N.W.2d 692

[5] Although WIS. STAT. § 805.14(1) speaks of measuring the evidence against "a verdict, or an answer in a verdict," the supreme court cited this subsection in the context of a motion to dismiss at the close of the plaintiff's case. ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis. 2d 740, 788, 501 N.W.2d 788 (1993).

(1986); *see also* Comment to WIS JI—CIVIL 1920 Private Nuisance: Negligent Conduct. The Restatement provides:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

RESTATEMENT (SECOND) OF TORTS § 822 (1977).

¶15 On appeal, the Wepkings argue that their evidence established the basis for a jury finding of intentional conduct by MBJ. Once again, the record belies the Wepkings' argument. The Wepkings' complaint, although sounding in private nuisance, does not expressly state whether the alleged conduct by MBJ was, in the words of the Restatement, "intentional and unreasonable" or "unintentional and otherwise … negligent or reckless." However, in his opening statement, the Wepkings' counsel advised the jury that MBJ's negligence was the premise for the Wepkings' nuisance claim. MBJ's attorney responded in kind, telling the jury that the evidence would not show any negligence by MBJ.

¶16 MBJ's motion for dismissal at the close of the Wepkings' case continued on the same theme. MBJ argued that the evidence failed to show any negligence. In response, the Wepkings contended otherwise, even citing to the negligence language of WIS JI—CIVIL 1920. The Wepkings never argued that the evidence demonstrated intentional conduct by MBJ. In light of this record, the trial court's ruling was understandably limited to the question of MBJ's alleged negligence. In summary, the Wepkings' appellate argument that MBJ's conduct

was intentional under the Restatement is raised for the first time on appeal. The general rule is that an issue not presented to the trial court will not be considered for the first time on appeal. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154. We see no reason to depart from this rule in this case.

¶17 Thus, this case was tried as a private nuisance case based on MBJ's alleged negligence, and we address the correctness of the trial court's dismissal order on this basis.

¶18 The Wepkings contend that they were not obligated to present specific evidence of MBJ's negligence in support of their nuisance claim. They argue that their "before and after" evidence sufficiently demonstrates that MBJ's conduct caused the flooding of their property and that such conduct was self-evidently negligent. As such, the Wepkings liken this case to a res ipsa loquitur situation.[6]

¶19 The application of the res ipsa loquitur doctrine is permitted only when the occurrence "clearly speaks for itself." ***Kelly v. Hartford Cas. Ins. Co.***, 86 Wis. 2d 129, 134, 271 N.W.2d 676 (1978). The following conditions must be present before the doctrine is applicable: (1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the

[6] MBJ argues that the Wepkings' res ipsa loquitur argument is waived because they did not make the argument in the trial court. We reject this argument as overly technical. Although not invoking the magic phrase "res ipsa loquitur," the Wepkings did argue that their evidence showing the "before and after" condition of their property was sufficient to demonstrate negligence. We deem this argument to be the functional equivalent of the res ipsa loquitur doctrine. Additionally, we note that MBJ alluded to the doctrine in support of its motion to dismiss and that the Wepkings responded to that argument. Thus, the issue was before the trial court, and we do not deem the issue waived.

agency of instrumentality causing the harm must have been within the exclusive control of the defendant. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶34, 241 Wis. 2d 804, 623 N.W.2d 751. When these two conditions are present, they give rise to a permissible inference of negligence, which the jury is free to accept or reject. ***Id***.

¶20 While Wisconsin recognizes that the res ipsa loquitur doctrine can apply in a case involving professional conduct, that application is limited to situations in which a layperson is able to say, *as a matter of common knowledge*, that the consequences of the professional conduct are not those which ordinarily result if due care is exercised. *See* ***Kelly***, 86 Wis. 2d at 132-33. The doctrine does not apply in cases where expert testimony is necessary to enable the jury to understand the requisite professional standard of care. *See* ***id***. at 135.

¶21 In ***Kelly***, the supreme court noted a prior medical malpractice case where the court had approved the application of the res ipsa loquitur doctrine where the area of the bodily injury was not involved in the medical procedure under scrutiny. ***Id***. at 134 (referencing ***Beaudoin v. Watertown Mem'l Hosp.***, 32 Wis. 2d 132, 145 N.W.2d 166 (1966)). In that situation, the court observed that "a layman could conclude as a matter of common knowledge that burns in an area unassociated with the operation ordinarily do not result if due care is exercised." ***Id***. However, the court further noted a series of other cases in which the court had refused to allow application of the doctrine, and instead required expert testimony. ***Id***. at 135. Refusing to apply the doctrine in the case before it, the ***Kelly*** court observed that the medical procedure at issue was one "requiring special knowledge and training. Based upon this testimony, we cannot hold the injury in question analogous to situations where an instrument is left inside the patient or

there is an injury to a part of the patient's anatomy which is not under treatment." ***Id***. at 136.

¶22 Here, the allegations against MBJ rest on a claim of negligent development of a subdivision, including the negligent construction of a drainage system. The resolution of that question takes a layperson into the science of hydraulics, the profession of engineering, and the craft of subdivision development and drainage system construction. These are areas clearly beyond the common knowledge of the average layperson. In short, the periodic flooding of the Wepkings' property is not the functional equivalent of an instrument left inside a surgery patient. We therefore conclude that this is not a proper case for application of the res ipsa loquitur doctrine.

¶23 Our rejection of the res ipsa loquitur doctrine in this case largely foretells that we also reject the Wepkings' further argument that the evidence nonetheless demonstrates that MBJ's conduct was unreasonable, negligent or a violation of an applicable standard of care. When granting MBJ's motion to dismiss at the close of the Wepkings' evidence, the trial court said, "My problem, what does the jury have to measure against to determine whether or not this water that's on … the Wepkings' property was due to the negligence of the defendant and how they designed whatever they designed." We agree. As we have already noted, Koch was never asked whether MBJ's development of the subdivision generally, or its construction and design of the drainage system specifically, was negligent, unreasonable or not in keeping with applicable standards governing the industry or profession. Thus, had the trial progressed to jury deliberations, the jury would have been without any competent evidence to say that MBJ's conduct violated the applicable standard of care recited in the jury instructions. Without such evidence, be it expert or lay opinion, any jury verdict would be based on rank

speculation. Therefore, the trial court properly dismissed the Wepkings' nuisance claim.[7]

¶24 The Wepkings argue that MBJ's placement of the discharge pipe approximately one foot below the level indicated in the computer model prepared by the Village constitutes evidence of negligence. We disagree for a number of reasons. First and foremost, as we have already noted, there is no evidence demonstrating that MBJ's location of the discharge pipe was unreasonable, negligent or in violation of an applicable standard of care. Second, there is no evidence demonstrating that the Village's computer model represents an industry standard, or that a deviation from the model was unreasonable or negligent.

¶25 The Wepkings also cite to Koch's testimony that MBJ could have diverted the water elsewhere as evidence of negligence. But this argument begs the issue before us. The question is not whether other diversion plans were available. Rather, the question is whether the diversion plan actually implemented was unreasonable or negligent. As noted, the record is barren on this point.

¶26 Finally, the Wepkings argue that the trial court's ruling stands for the proposition that a developer's compliance with the terms of a municipal approval "would always completely relieve M.B.J. Properties and all builder/developers of total negligence liability." We summarily reject this argument because the trial court did not dismiss the Wepkings' complaint on the

[7] The Wepkings also argue that ***State v. Deetz***, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), supports their argument that expert testimony was not required since the decision does not allude to any expert testimony. However, the omission of any reference to expert testimony is not remarkable since that question was not before the supreme court. Rather, as noted, the issue was whether Wisconsin should abandon the "common enemy" doctrine in favor of the "reasonable use" doctrine.

basis that MBJ complied with the Village's approvals. In fact, the court never reached that question *because the case never progressed to MBJ's potential evidence on that question*. As the court aptly noted, "I don't know what the defense is because we haven't gotten to that point yet. Question is whether the plaintiff has met its burden in proving anything here." The trial court dismissed the complaint for one simple and basic reason—the Wepkings' evidence failed to establish negligence.

¶27 As we have noted, when evaluating a motion to dismiss at the close of the plaintiff's case, the trial court and this court are required, pursuant to WIS. STAT. § 805.14(1), to consider all the credible evidence and to draw all reasonable inferences in favor of the party against whom the motion is directed. But this favorable test to a plaintiff assumes the presence of credible evidence in the first instance. Here, not only is there no credible evidence to support an inference of negligence, but there is no evidence whatsoever on this element of the Wepkings' nuisance claim. Thus, the trial court's ruling was not clearly wrong.

Trial Court's Rejection of the Wepkings' Request to Reopen the Evidence

¶28 After the trial court granted MBJ's motion to dismiss at the close of the Wepkings' evidence, the Wepkings asked the court to reopen the trial to allow them to put on evidence regarding the standard of care and damages. The Wepkings stated that they wanted to recall Koch and to adversely call a potential expert witness retained by MBJ who was present in the courtroom. MBJ objected on the grounds that the Wepkings had already rested their case. The trial court agreed and denied the request to reopen the trial.

¶29 Approximately two months later, the Wepkings filed a motion to supplement the record with various plaintiffs' exhibits that had been marked and

referred to during the testimony of Sharon Wepking and Koch. The motion was brought pursuant to WIS. STAT. RULE 809.15(3). At the hearing on the motion, the Wepkings' attorney acknowledged that he had failed to move the exhibits into evidence before resting the case. These exhibits consisted of various photographs and several written reports by Koch, one of which appended some Village records relative to the MBJ project. Some of the photographs had been published to the jury. The Wepkings stated that they wanted the exhibits included in the record for purposes of a possible appeal. At this hearing, the parties also debated whether the trial court had erroneously rejected Koch as an expert witness. In the final analysis, the trial court denied the Wepkings' request to supplement the record.

¶30 On appeal, the Wepkings do not raise any issue regarding the trial court's refusal to allow them to reopen the evidence in order to present additional witnesses. Instead, their argument is limited to the trial court's ruling denying their request to belatedly include their exhibits in the record.

¶31 The Wepkings acknowledge that their motion may have been improvidently brought pursuant to WIS. STAT. RULE 809.15(3) of the Rules of Appellate Procedure. This Rule allows for supplementation of a trial court record following the initial compilation of the record on appeal pursuant to RULE 809.15(2). Here, no appeal had yet been taken at the time of the Wepkings' motion and the hearing. So the request was clearly premature and the Rule was not in play.

¶32 The Wepkings contend that the trial court nonetheless should have granted their motion. They contend that the exhibits were "relevant, competent and reliable" evidence and did not prejudice MBJ. A motion to reopen a case for

additional evidence lies in the sound discretion of the trial court. ***Stivarius v. DiVall***, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984).

¶32 Here, even if we assume that the trial court erred in the exercise of its discretion, we deem such error harmless because the substance of the exhibits was made known to the court via the testimony of Sharon Wepking and Koch at the jury trial. Sharon Wepking identified and described what was depicted in the photographs that she took, and these photographs were even published to the jury. In addition, Koch summarized the contents of his reports in his testimony, even to the point of extensively reading directly from one of the reports. Finally, and most importantly, none of these exhibits served to fill in the gaping hole in the Wepkings' evidence and which lies at the heart of this case—the lack of any evidence demonstrating unreasonable conduct or negligence by MBJ or any violation of an applicable standard of care.[8]

CONCLUSION

¶33 We hold that this is not a case allowing for application of the res ipsa loquitur doctrine. We further hold that the Wepkings failed to offer any evidence, expert or otherwise, in support of their claim that MBJ's conduct was unreasonable, negligent or in violation of any applicable standard of care. Finally, we hold that any assumed error by the trial court in rejecting the Wepkings' motion to supplement the record was harmless. We affirm the judgment dismissing the Wepkings' complaint.

[8] The Wepkings further argue that the admission of the exhibits would not have delayed the jury trial. This argument is wholly misplaced. The Wepkings did not seek to supplement the record with the exhibits until long after the trial court had granted the motion to dismiss and discharged the jury.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.