COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1300 **Cir. Ct. No. 2011CV707**

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

JAMIE HIELKEMA,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

FORREST CONSTRUCTION, INC. AND RODNEY FORREST,

DEFENDANTS,

SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION,

SUBROGATED DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: R. MICHAEL WATERMAN, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jamie Hielkema was injured when she fell from a second-story doorway. She brought, via a direct action, common law negligence and negligence per se claims, as well as a claim for an "enhanced injury"[1] against Secura Insurance, A Mutual Company (Secura). Hielkema's enhanced injury and negligence per se claims were dismissed on summary judgment. After a jury found Hielkema was more causally negligent than Secura's insured, the circuit court dismissed Hielkema's common law negligence claim against Secura. Hielkema appeals.

¶2 On appeal, Hielkema contends the circuit court erred by dismissing on summary judgment her claims for an enhanced injury and negligence per se. Hielkema also seeks a new jury trial on her general negligence claim arguing the circuit court erred by failing to dismiss a biased juror and by allowing the admission of "speculative intoxication evidence." We disagree and affirm the judgment.

¶3 Secura cross-appeals, arguing the circuit court erred by denying its motion for summary judgment as to Hielkema's general negligence claim. Because we affirm the judgment in Secura's favor, Secura's cross-appeal is moot.

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[1] Liability based on "enhanced injury" arises when a successive tortfeasor is alleged to have enhanced or aggravated the plaintiff's injuries, but is not alleged to have caused the initial accident or damage. ***Farrell by Lehner v. John Deere Co.***, 151 Wis. 2d 45, 60-61, 443 N.W.2d 50 (Ct. App. 1989). Therefore, the successive tortfeasor is not jointly liable for all the plaintiff's injuries, but only for those injuries caused by the tortious conduct over and above the damage or injury that would have occurred as a result of the initial tortfeasor's actions absent the successor tortfeasor's conduct. ***Id.*** at 61.

BACKGROUND

¶4 In 2009, Hielkema was living with her then-boyfriend, Eric Butler, in his home. Three years prior to Hielkema moving into Butler's residence, Butler hired Rodney Forrest of Forrest Construction, Inc. (referred to collectively as Forrest Construction) to remove a rotting second-floor deck from the exterior of his home. Forrest Construction removed the deck. Butler did not have the deck replaced. After the deck was removed, a functional sliding patio door that led outside to the former deck remained in the second floor of Butler's home.

¶5 Hielkema and Butler were both home on the night of September 8, 2009. Butler went to bed alone around 8:30 p.m. Butler later heard a "thud." He got up, discovered the second-floor door was half open and found Hielkema on the concrete pavers on the ground below the patio doorway. Hielkema has no recollection of how she fell. However, shortly after her fall, Hielkema told a police officer that she had been sleepwalking and walked out the patio door. Butler testified Hielkema's behavior on the night of the accident was consistent with her prior sleepwalking behavior. In addition, Butler thought Hielkema had consumed alcohol earlier that night, although he could not be sure of it.

¶6 Hielkema commenced this personal injury action, ultimately asserting claims against Secura, as Forrest Construction's liability insurer, for common law negligence and negligence per se.[2] The circuit court denied Secura's

[2] Hielkema initially brought these claims against Butler, Secura, Forrest Construction and Rodney Forrest, the owner of Forrest Construction. However, Hielkema later dismissed Forrest Construction and Rodney Forrest from the litigation, and settled with Butler. The notice of appeal only involves Secura as a respondent. Therefore, we will refer only to Secura, except where it is necessary to refer to Butler, Forrest Construction or Rodney Forrest.

first motion for summary judgment, which sought dismissal of the complaint on the basis that Hielkema was more negligent than Forrest Construction and Rodney Forrest as a matter of law. On Secura's subsequent summary judgment motion, the court dismissed Hielkema's claim that Forrest Construction's negligence caused her an enhanced injury. The court subsequently denied Hielkema's and Secura's motions for reconsideration and Hielkema's motion for summary judgment on her negligence per se claim (based upon several asserted building code violations), and instead dismissed the claim. The matter proceeded to a jury trial on Hielkema's common law negligence claim.

¶7 After the trial began, and after Hielkema's counsel's opening statement, Juror 105 expressed to a bailiff that she could not be fair and impartial in this case due to her religious beliefs. The circuit court and counsel addressed the issue with Juror 105 in chambers. Juror 105 explained she was a Mormon, and that when she heard that Hielkema had been living with Butler during the opening statement, it "raised a red flag" because of her religious beliefs. She indicated that the knowledge "left [her] feeling in favor of Forrest Construction simply because ... [Hielkema] shouldn't have even been there." During further voir dire, Juror 105 indicated that she "also d[id]n't condone" Hielkema's drinking. Juror 105 ultimately expressed that she would do her best to set aside her religious beliefs and listen to the evidence, though she also stated she thought doing so would be difficult.

¶8 Hielkema asked the circuit court to remove Juror 105 from the jury panel for cause, and Secura opposed her removal. The court denied Hielkema's request on the basis that Juror 105: (1) did not raise any moral or philosophical beliefs that would interfere with her ability to be fair and impartial; (2) acknowledged that people who did not adhere to her religious standards should

not be treated differently; (3) indicated she could follow the court's instructions; and (4) was willing to listen to all the evidence and deliberate.

¶9 Prior to closing arguments, Hielkema renewed her motion to remove Juror 105. The circuit court again denied Hielkema's motion. The jury verdict apportioned causal negligence as follows: (1) Forrest Construction: 19%; (2) Butler: 61%; and (3) Hielkema: 20%. Because Hielkema's causal negligence exceeded that of Forrest Construction, the court entered judgment dismissing the action against Secura.

¶10 Hielkema filed motions after verdict seeking judgment notwithstanding the verdict or, in the alternative, a new trial. As to the motion for a new trial, Hielkema argued: (1) the circuit court should have allowed her to pursue her claim that Forrest Construction's negligence "enhanced" her injury (2) Juror 105 was biased, such that Hielkema did not receive a trial by a fair and impartial jury; and (3) Hielkema was prejudiced by the admission of speculative evidence regarding her intoxication on the night of the accident. The circuit court denied Hielkema's postverdict motions. Hielkema now appeals and Secura cross-appeals, arguing the circuit court erred in denying its first motion for summary judgment as to Hielkema's negligence claim.

DISCUSSION

I. Hielkema's appeal

A. Summary judgment—enhanced injury

¶11 We independently review a grant or denial of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. "Under that methodology, the

court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, we then examine the moving party's submissions to determine whether they establish a prima facie case for summary judgment. ***Id.*** If the moving party has made a prima facie showing, we examine the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. ***Id.***

¶12 Hielkema argues the circuit court erred in dismissing her claim for an "enhanced injury" on summary judgment. However, her argument in this regard is confusing at best. Hielkema appears to contend that her own negligence in not taking precautions, especially in light of her known tendency to sleepwalk, to make herself reasonably safe in the setting where there was no deck to prevent her fall upon exiting the second-floor door, is a separate act of negligence from that of "Defendants.'"[3] She argues that her injuries sustained in the fall occurred due to "Defendants'" negligent failure to protect the second-floor door with a guardrail or with some kind of doorstop to limit the opening of the door. As best as we can understand, she posits that the injuries she sustained due to her fall to the ground were secondary to and enhanced an unknown injury she would have sustained based upon her negligence in attempting to or exiting the patio door if it had been properly secured. In short, Hielkema asserts she would have been first

[3] Hielkema's brief repeatedly attributes arguments made, both in the circuit court and on appeal, as to "Defendants" without defining to which parties this term applies. Apparently, she intends the term "Defendants" to include Butler, Rodney Forrest and Forrest Construction, even though they were dismissed before this appeal. We remind counsel that references shall be to names, not party designations. *See* WIS. STAT. RULE 809.19(1)(i) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

injured as the result of her negligence in attempting to exit a properly secured door. The negligent failure of Butler and Forrest Construction to properly secure the door caused her to fall and enhance her original injury.

¶13 Liability based on an enhanced injury has been recognized in Wisconsin in cases involving successive torts in negligence and products liability.[4] *See* ***Farrell by Lehner v. John Deere Co.***, 151 Wis. 2d 45, 60, 443 N.W.2d 50 (Ct. App. 1989). In claims involving enhanced injuries, the successive tortfeasor is alleged to have enhanced or aggravated the plaintiff's prior injuries, but not to have caused the initial accident or damage. ***Id.*** at 60-61. The successive tortfeasor is not jointly liable for all of the plaintiff's injuries, but only for the injuries over and above the damage or injury that would have occurred as a result of the injury-causing event absent the successive tortfeasor's conduct. ***Id.*** at 61.

¶14 Here, the circuit court granted partial summary judgment, determining that the facts were insufficient for Hielkema's putative "enhanced injury" claim to go to the jury. Whether there are sufficient credible facts to allow a circuit court to give an enhanced injury instruction is a question of law, which we review de novo. ***Farrell by Lehner v. John Deere Co.***, 151 Wis. 2d 45, 60, 443 N.W.2d 50 (Ct. App. 1989). Hielkema concedes there is no authority applying the enhanced injury doctrine in a fact situation analogous to the undisputed facts in this case, but she argues it should apply nonetheless.

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[4] *See* ***Farrell***, 151 Wis. 2d 45 at 60 n.3 (listing the following examples of enhanced injury cases: ***Sumnicht v. Toyota Motor Sales, U.S.A.***, 121 Wis. 2d 338, 360 N.W.2d 2 (1984); ***Johnson v. Heintz***, 73 Wis. 2d 286, 243 N.W.2d 815 (1976); ***Arbet v. Gussarson***, 66 Wis. 2d 551, 225 N.W.2d 431 (1975); and ***Maskrey v. Volkswagenwerk Aktiengesellschaft***, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985)).

¶15 Hielkema's "enhanced injury" claim fails as a matter of law for various reasons. First, she does not identify distinct initial and successive torts, much less attribute them to specific tortfeasors. Rather, she alleged Butler and Forrest Construction were both negligent in leaving the patio door without a deck outside the house and failing to attach a guardrail outside the second-floor door. It appears Hielkema claims that she is the initial tortfeasor (for attempting to exit the doorway), and Butler and/or Forrest Construction are the successive tortfeasors (for failing to secure the doorway causing her enhanced injuries) in an attempt to separate her own negligence from any contributory negligence analysis and attribute all her injuries to Butler and/or Forrest Construction. We reject this argument.

¶16 Hielkema's argument that there were two tortious events is speculative at best because she has no way of proving how she got through the door or how she ended up falling to the ground outside.[5] The burden of proof is on the party claiming an enhanced injury to show that there were two separate torts, or "separate conduct" that "constitute[s] distinct factors and events contributing to [the plaintiff's] total injuries." *See* ***Farrell***, 151 Wis. 2d at 61. Contrary to Hielkema's assertions, this is not irrelevant. Hielkema has the burden to show causal negligence in the first and second tortious events. She cannot do so here because she cannot show that any negligence contributed to her accidental exit or that any such negligence, if shown, constituted a different event from the failure to properly secure the doorway.

[5] The circuit court instructed the parties not to speculate as to Hielkema's encounter with the door or how she ended up on the ground because "there [was] no credible evidence describing that encounter and why it was that she went from the inside to the outside."

¶17 These facts do, however, fall easily into the category of claims of ordinary negligence. To establish a negligence claim, a plaintiff must prove: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the breach and the plaintiff's injury; and (4) actual loss or damage resulting from the injury. ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. An ordinary negligence case may involve a situation in which more than one party negligently caused an injury. *See* ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶10, 244 Wis. 2d 720, 730, 628 N.W.2d 842. Situations in which there was only one tortious event—including the facts surrounding Hielkema's fall in this case—are governed by the comparative negligence statute, WIS. STAT. § 895.045(1). *See* ***Matthies,*** 244 Wis. 2d 720, ¶10.

¶18 Second, Hielkema does not identify two distinct injuries, as is required for an "enhanced injury" claim. Hielkema analogizes her fall to what occurred in ***Kutsugeras v. AVCO Corp.***, 973 F.2d 1341 (7th Cir. 1992), an enhanced injury case in which the plaintiff fell backward into farm machinery. In ***Kutsugeras***, the plaintiff had two distinct injuries: the first caused by his fall into the machine; and the second caused by his inability to stop the machine, which lacked an emergency stopping device. ***Id.*** at 1343. The fall into the machine injured the plaintiff's hand, which became caught in the machinery. ***Id.*** The plaintiff's subsequent inability to stop the machine resulted in further harm, including injuries to his other limbs. ***Id.*** at 1346.

¶19 Rather than identify an initial injury and a subsequent injury, Hielkema suggests possible safety devices that could have prevented her fall. A doorstop, she explains, would have limited the door from opening, thus preventing her from falling out of the open doorway. Alternatively, a guardrail would have

allowed her to open the door and attempt to exit, but it would have stopped her from falling out of the doorway opening. Hielkema argues that had there been a guardrail, her initial injury would have been a potential injury caused by her contact with the guardrail. She does not describe what her initial injury would have been had there been a doorstop. In short, Hielkema simply identifies the lack of a guardrail or doorstop as leading to her fall to the ground.

¶20 In reality, Hielkema cannot show a first injury. Her argument makes this apparent, as she claims all her injuries were caused by the fall—i.e., the supposed second tortious event. Ultimately, there was no material question of fact because Hielkema cannot have an enhanced injury where there was no original injury to enhance. Therefore, the circuit court correctly granted summary judgment dismissing that claim.

B. Summary judgment—negligence per se

¶21 Next, Hielkema argues the circuit court erred in denying her motion for partial summary judgment on the issue of the "Defendants'" negligence per se. The violation of a safety statute constitutes negligence per se. *See* ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶24, 233 Wis. 2d 371, 607 N.W.2d 637. "A safety statute is a legislative enactment designed to protect a specified class of persons from a particular type of harm." ***Id.*** (citation omitted).

¶22 The circuit court denied Hielkema's motion and dismissed her negligence per se claim, reasoning that the cause of Hielkema's injury was an issue for the jury. The court explained that Hielkema's negligence per se claim was speculative because "no one [knew] for sure what caused the fall." The court concluded that Hielkema was essentially asking the court to find that Forrest Construction was negligent simply because Hielkema was injured.

¶23 While the circuit court's reasoning may not sufficiently explain why a negligence per se instruction could not have been given to the jury in this case, Hielkema's negligence per se claim is rendered moot by the jury verdict. The jury found Forrest Construction negligent, and it found that its negligence was a cause of Hielkema's injury. Even if the circuit court had granted Hielkema's motion for partial summary judgment on negligence per se, the comparison question would still have been left to the jury. *See* ***Dippel v. Sciano***, 37 Wis. 2d 443, 461-62, 155 N.W.2d 55 (1967). Therefore, the trial's outcome would have been the same, and there is no basis to reverse and grant Hielkema's motion for partial summary judgment.

C. Juror bias

¶24 Hielkema next argues the circuit court erroneously exercised its discretion[6] when it denied her motion for a new trial on the basis of Juror 105's alleged bias. Hielkema claims that Juror 105 was subjectively biased because her Mormon beliefs were at odds with Hielkema's nonmarital cohabitation and with her use of alcohol. Subjective bias refers to the prospective juror's state of mind. ***State v. Faucher***, 227 Wis. 2d 700, 717, 596 N.W.2d 770 (1999). Jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias. ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). To overturn a jury verdict on this basis, the challenger must produce clear and

[6] We note Hielkema uses the phrase "abuse of discretion." Our supreme court replaced the phrase "abuse of discretion" with "erroneous exercise of discretion" in 1992. *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶21 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

convincing evidence of the juror's bias. ***After Hour Welding, Inc. v. Laneil Mgmt. Co.***, 108 Wis. 2d 734, 741, 324 N.W.2d 686 (1982).

¶25 The question of whether a prospective juror is biased and should be removed from the jury panel is left to the circuit court's discretion. ***State v. Guzman***, 2001 WI App 54, ¶11, 241 Wis. 2d 310, 624 N.W.2d 717. We will uphold the circuit court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous. *See* ***State v. Funk***, 2011 WI 62, ¶30, 335 Wis. 2d 369, 799 N.W.2d 421.

¶26 Hielkema has not met her burden of proof as to Juror 105's subjective bias. The record reflects that the circuit court engaged in an extensive inquiry with all jurors during voir dire to ferret out any potential bias, and the parties were given the opportunity to do the same. Juror 105 said nothing during the initial voir dire to indicate she was biased.

¶27 A juror may reveal subjective bias by an explicit assertion of bias or through his or her demeanor. ***Id.***, ¶¶45-46. Here, Juror 105 followed the circuit court's instructions by contacting the court to express her concerns about potential bias as soon as the issue arose. Then, the court and the parties conducted additional, individual voir dire of Juror 105. Juror 105 explicitly expressed her reservations regarding Hielkema's living situation and possible alcohol use. Nonetheless, Juror 105 ultimately expressed that she would do her best to set aside her religious beliefs and would listen to the evidence, even though she also thought doing so would be difficult. When questioned further, she unequivocally answered that she would listen to all the evidence and to the circuit court's instructions about the law, including what she could and could not consider in deciding the case. A juror need not unambiguously state his or her ability to set

aside a bias, but the juror's unambiguous statement that he or she will follow the law and act impartially serves as evidence weighing against a finding that the juror is subjectively biased. ***Faucher***, 227 Wis. 2d at 731.

¶28 Hielkema argues that during this additional voir dire, Juror 105's equivocations as to her ability to set aside her bias were "on par" with the "probably" statements referenced in ***Faucher***, which the supreme court concluded demonstrated subjective bias. *See* ***id.*** at 725. We understand Hielkema to be referring to ***Faucher***'s discussion of ***State v. Ferron***, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). In ***Ferron***, a juror explained during voir dire that if he were impaneled, he could not fail to consider the defendant's refusal to testify in his own defense. ***Faucher***, 227 Wis. 2d at 725. After additional voir dire and repeated explanation of the law by the circuit court, the juror stated that he could "probably" decide the case without considering the fact that the defendant did not take the stand. ***Id.*** ***Faucher*** explained the juror's response that he "probably" could set aside his bias was evidence of a "lack of sincere willingness to set aside his bias [that] illustrate[d] that he was not 'indifferent in the case.'" ***Id.*** (alteration in original) (quoting ***Ferron***, 219 Wis. 2d at 503).

¶29 ***Ferron*** is distinguishable because the juror in that case said he could "probably" set aside his bias. Here, although Juror 105 expressed that it would be difficult to set aside her religious beliefs, she stated twice that she *would* "set [them] aside" in favor of the evidence. Juror 105 also stated that she would be able to listen to the circuit court's instructions "about what the state of the law is and what [she] may and may not consider." In addition, Juror 105 was asked whether she believed people who do not follow her religious standards should be treated differently. She answered, "No." Unlike in ***Ferron***, Juror 105's statements evince a sincere willingness to set aside her bias. Therefore, the circuit

court's finding is not clearly erroneous, and the court properly exercised its discretion in denying Hielkema's motion for a new trial on this basis.

D. Intoxication evidence

¶30 Butler testified that he thought Hielkema drank alcohol earlier on the night of her fall, though he could not be sure of it. On cross-examination, he testified that he did not know whether Hielkema drank alcohol prior to her fall. However, Butler also admitted that shortly after the incident, Butler reported to a police officer that he believed Hielkema may have been intoxicated when she fell. Butler also explained he had given the officer an estimate of how much wine—two to three glasses—he believed Hielkema had consumed that evening. On appeal, Hielkema argues the circuit court erred when it failed to grant her a new trial on the basis of Butler's testimony regarding her intoxication on the night of the accident, which she contends was speculative, lacking foundation, and unduly prejudicial.

¶31 Secura claims Hielkema failed to preserve her objections to Butler's testimony regarding her intoxication by failing to object to its introduction at trial. In response, Hielkema claims the circuit court found she preserved all objections to the intoxication evidence. However, she fails to direct us to anything in the record supporting the court's finding, and our independent review of the record shows she did not object to Butler's testimony about her intoxication on the evening of her fall. Wisconsin case law has repeatedly held that parties forfeit any objection to the admissibility of evidence when they fail to timely object at trial. ***State v. Veach***, 2002 WI 110, ¶99, 255 Wis. 2d 390, 648 N.W.2d 447; *see also*

State v. Edwards, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537.[7] Therefore, Hielkema has forfeited her right to object to the introduction of the intoxication evidence on appeal.[8]

¶32 Hielkema also argues the undue prejudice of the intoxication evidence came to bear during Secura's closing argument, because its counsel suggested to the jury that Hielkema's intoxication caused her fall. In addition, she claims that Secura's discussion of the intoxication evidence during its closing argument violated the circuit court's order prohibiting the parties from arguing to the jury how Hielkema ended up on the patio. Again, Secura argues that Hielkema forfeited her right to raise these issues on appeal by failing to object during Secura's closing argument. We agree. The record reflects Hielkema failed to object to Secura's closing argument, request a cautionary or curative instruction, or move for mistrial. Without a contemporaneous objection, Hielkema prevented the circuit court from having the opportunity to correct any alleged error. *See* ***State v. Doss***, 2008 WI 93, ¶83, 312 Wis. 2d 570, 754 N.W.2d 150; ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. Therefore, Hielkema forfeited her challenge to Secura's closing argument on appeal.

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[7] We note that ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447, and ***State v. Edwards***, 2002 WI App 66, 251 Wis. 2d 651, 642 N.W.2d 537, use the term "waive" rather than "forfeit." However, our supreme court later clarified the distinction between waiver and forfeiture in ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612. Forfeiture "often involves the failure to make the timely assertion of a right," including "when a party fails to raise an evidentiary objection." ***State v. Anthony***, 2015 WI 20, ¶55, 361 Wis. 2d 116, 860 N.W.2d 10 (citations omitted).

[8] Hielkema does not make a plain error argument in an attempt to overcome the forfeiture.

II. Secura's cross-appeal

¶33 Secura cross-appeals, arguing the circuit court erred in denying its motion to dismiss Hielkema's negligence claim as a matter of law, and its motion for reconsideration of that denial. Secura claims the court should have dismissed Hielkema's negligence claim because her negligence exceeded Forrest Construction's negligence as a matter of law and her claim was barred by public policy. This issue is now moot because we affirm the judgment entered upon the jury's verdict apportioning greater liability to Hielkema than to Forrest Construction. We need not address moot issues. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

By the Court.—Judgment affirmed.

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