

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2006

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. 2005AP2343

Cir. Ct. No. 2003CV961

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ESTATE OF HAROLD SEIDL, MURIEL SEIDL AND MARK SEIDL,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN PUBLIC SERVICE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County:
SUE E. BISCHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. The Estate of Harold Seidl, and Muriel and Mark Seidl appeal a judgment dismissing their claims against Wisconsin Public Service Corporation (WPSC). The Seidls argue that WPSC's motion for a directed verdict was procedurally barred because the jury's improper verdict had resulted in a

mistrial. Alternatively, the Seidls argue that credible evidence supported a verdict in their favor and, therefore, the circuit court erred by granting a directed verdict on the merits. We reject the Seidls' arguments and affirm the judgment.

BACKGROUND

¶2 The Seidls owned and operated a dairy farm in Luxemburg. In June 2003, they commenced this action against WPSC alleging that they suffered damages as a result of stray electricity emanating from WPSC's electrical distribution system. The Seidls' complaint included claims for negligence, nuisance, statutory treble damages, and intentional nuisance.

¶3 Beginning in September 2004, a three-week jury trial was held. At the close of the Seidls' case-in-chief, WPSC moved to dismiss. The court stated, "I am well aware that except in the clearest of case, I should withhold a ruling on any sort of directed verdict and permit the case to go to the jury." The court further concluded,

at this point, I am going to deny [WPSC's motions], understanding that they can be renewed both at the close of the case and in motions after verdict Without a transcript, where I can fully assess precisely what these experts said and precisely what their criticisms were, I am in a tough position.

¶4 At the close of all the evidence, WPSC moved for a directed verdict. The circuit court granted WPSC's motion as to the intentional nuisance and treble damages claims, but decided to send the remaining claims to the jury. The court noted:

[E]ven though I take copious notes, I think I got up to page 469 or something – you sometimes need full transcripts and precise testimony to determine whether this is purely a credibility issue and the reasonable inferences and the light most favorable to the plaintiffs or not. And it's hard for me

to do after a three-week trial. And your motions certainly if I deny them are preserved. You can raise them again in motions after verdict when we might have the opportunity to get transcripts and people can point out to me specific things that were said or weren't said.

WPSC's attorney indicated that WPSC would renew its motion after it obtained transcripts.

¶5 After the jury returned its verdict, the court determined it could not accept the verdict because the jury ignored the law and the jury instructions.¹ The jury failed to make a total damages finding, but instead calculated a partial damage figure based on the difference between the Seidls' and WPSC's negligence. The Seidls moved for a mistrial, WPSC joined the motion, and the court granted the motion. The court set a conference to schedule further proceedings, and WPSC indicated it would renew its directed verdict motion after it obtained trial transcripts.

¶6 At the scheduling conference, a new trial date was scheduled, as well as a briefing schedule for WPSC's directed verdict motion. The Seidls' response brief alleged that WPSC's motion should be construed as a motion after verdict, not a motion for directed verdict, and was therefore untimely. The court determined the motion was timely and that the Seidls had not offered sufficient credible evidence to support a verdict in their favor. It granted WPSC's motion for directed verdict and entered judgment in WPSC's favor.

¹ The jury's verdict found WPSC 54% negligent and the Seidls 46% negligent. However, regarding damages, the verdict indicated, "We the jury wish to award the Seidls 8% of \$1,365,000 [the damage figure as calculated by the Seidls' economist], which is \$109,200."

DISCUSSION

I. THE SEIDLs' PROCEDURAL ARGUMENTS

¶7 The Seidls argue a directed verdict was improper for three procedural reasons: (1) After the court granted a mistrial, the first trial became a legal nullity and therefore no directed verdict could be entered; (2) WPSC waived its right to move for a directed verdict because it joined the Seidls' motion for a mistrial, which was granted; and (3) WPSC's motion was time barred by WIS. STAT. § 805.16.²

A. Whether the Court May Grant Directed Verdict after a Mistrial

¶8 First, the Seidls contend that, once the circuit court ordered a mistrial, it could not consider WPSC's motion for a directed verdict under WIS. STAT. § 805.14(4).³ The Seidls argue that the statute contemplates a challenge to the sufficiency of the evidence "in the context of an ongoing trial." Here, they contend, after the motion for mistrial was granted, the trial became a "legal

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ WISCONSIN STAT. § 805.14(4) provides:

In trials to the jury, at the close of all evidence, any party may challenge the sufficiency of the evidence as a matter of law by moving for directed verdict or dismissal or by moving the court to find as a matter of law upon any claim or defense or upon any element or ground thereof.

nullity”⁴ and thus there was no ongoing trial in which to raise a directed verdict motion and no evidence with any “legal effect” for WPSC to challenge.⁵

¶9 The Seidls rely primarily on *State ex rel. Polk v. Johnson*, 47 Wis. 2d 207, 210, 177 N.W.2d 122 (1970), which they assert held that a court can neither consider nor grant a motion for a directed verdict once a mistrial is declared. WPSC responds that *Polk* is not applicable here and that a directed verdict may be granted after a jury fails to return a verdict, citing *Shumway v. Milwaukee Athletic Club*, 247 Wis. 393, 20 N.W.2d 123 (1945) and *Calteaux v. Mueller*, 102 Wis. 525, 78 N.W. 1082 (1899).

¶10 *Polk* was a paternity action. The mother testified that the defendant was the only man who could be the child’s father. *Polk*, 47 Wis. 2d at 209. After plaintiffs’ case-in-chief, the father moved for a directed verdict. *Id.* The circuit court indicated that it did not believe the mother’s testimony, but that witness credibility was a jury determination and the mother’s testimony was sufficient evidence on which to submit the case to the jury. *Id.* at 213-14. After the father began his case, one of the jurors was excused and the plaintiffs did not stipulate to continuing the trial with eleven jurors. *Id.* at 208, 210. The circuit court then reconsidered and granted the father’s motion for a directed verdict, explaining that

⁴ WPSC contends the Seidls did not raise this “legal nullity” argument in the circuit court and have therefore waived the argument. We decline to apply the waiver rule here and reject the Seidls’ argument on the merits.

⁵ The Seidls support their argument that a mistrial renders a trial a legal nullity by citing *State v. Rowan*, 35 Wis. 303, 307 (1874). In *Rowan*, the court stated, “The trial in the circuit court was a mistrial, and no effect whatever can be given to it.” *Id.* However, the trial in *Rowan* occurred in a court that lacked jurisdiction. *Id.* Thus, while *Rowan* used the term “mistrial,” its facts and holding are inapposite here. The circuit court’s grant of a mistrial nullified the jury’s verdict, but did not nullify the entire trial.

the plaintiffs' refusal to continue left it "with no alternative" except to grant a directed verdict in the father's favor in order to avoid retrial. *Id.* at 212. Our supreme court concluded that the juror's disqualification was an improper basis for a directed verdict.

¶11 The Seidls argue that here, like *Polk*, no new evidence was taken nor did any other event occur between the court's initial denial of the directed verdict motion and later grant of directed verdict aside from the jury returning an improper verdict. Likewise, they conclude, the directed verdict here is improper. However, this similarity was not the basis for the *Polk* decision. The supreme court's decision was grounded on the reason for the directed verdict, not the procedural posture of the case.

¶12 In addition, while the Seidls rely on *Polk* to support their argument that a court has no authority to consider or grant a motion for a directed verdict once a mistrial is declared, *Polk* does not speak to that issue. WPSC contends, and we agree, that the Seidls' reliance on *Polk* is misplaced and that *Shumway* and *Calteaux* control.

¶13 In *Calteaux*, a motion for a directed verdict was denied with the understanding that the question of law would be considered after the verdict. *Calteaux*, 102 Wis. at 527. After the jury was unable to reach a verdict, the trial court granted a directed verdict. *Id.* The *Calteaux* court determined the directed verdict was proper, even though no verdict had been reached, because the motion presented a question of law and no verdict was necessary to make that determination. The court explained, "The fact that there was no formal verdict is immaterial. The case turned on a question of law, therefore a verdict, though it would have been proper, was not necessary." *Id.* at 530.

¶14 Similarly, in *Shumway*, a directed verdict motion during trial was denied, and the jury was unable to reach a verdict. The circuit court set the case for retrial, and then later granted a renewed motion for a directed verdict. *Shumway*, 247 Wis. at 395. On appeal, the *Shumway* court stated, “The appellant first claims that the court after directing retrial of the case should not have granted the motion for a directed verdict and entry of judgment dismissing the complaint. The claim is without merit.” *Id.* The court explained that the ultimate question to be decided was whether the trial evidence raised a jury question as to any claim. *Id.* at 397. Finding none, the *Shumway* court affirmed the trial court’s directed verdict.

¶15 The *Calteaux* and *Shumway* holdings demonstrate that, contrary to the Seidls’ assertions, a court may grant a directed verdict after a mistrial. A directed verdict motion does not rely upon a valid jury verdict, nor does the grant of a mistrial entirely negate the trial. Rather, a directed verdict motion presents a question of law that may be answered, as the circuit court did here with the benefit of the trial transcripts, after the jury failed to return a legally-acceptable verdict.

B. Whether WPSC Waived Its Directed Verdict Motion

¶16 The Seidls’ second procedural argument is that WPSC waived the right to move for a directed verdict when it joined in their motion for mistrial and a new trial was ordered.⁶ They cite criminal cases holding that when a defendant consents to a mistrial, the defendant cannot later avoid a second trial on double

⁶ WPSC counters that the Seidls waived this waiver argument by not raising it before the circuit court. Again, we address and reject the Seidls’ argument on the merits.

jeopardy grounds.⁷ We agree with WPSC that those criminal cases are inapplicable to the facts here, as double jeopardy does not apply in civil cases.

¶17 The Seidls also argue judicial estoppel bars WPSC from obtaining a directed verdict when it previously requested and was granted a mistrial. Judicial estoppel prevents a litigant from asserting one position in a legal proceeding and then subsequently asserting a contradictory position. *See State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). WPSC responds, and we agree, that under these circumstances joining the motion for mistrial and simultaneously indicating an intent to renew its motion for a directed verdict are not clearly inconsistent positions. *See id.* at 348 (for judicial estoppel to apply, later position must be clearly inconsistent with earlier position). WPSC asserted that the verdict was so flawed that it could not stand but also requested the court revisit whether the case should have gone to the jury in the first instance. WPSC's positions were not inherently contradictory and judicial estoppel should not bar WPSC from requesting a directed verdict after it obtained a mistrial.

C. Whether WPSC's Motion was Untimely

¶18 Third, the Seidls argue that, assuming the original trial resulted in a "verdict," WPSC's directed verdict motion constituted a WIS. STAT. § 805.14(5)(d) motion after verdict and was untimely under the applicable time provisions of WIS. STAT. § 805.16.⁸ Because courts lack jurisdiction to hear

⁷ The Seidls cite *State v. Harrell*, 85 Wis. 2d 331, 270 N.W.2d 428 (Ct. App. 1978), and *State v. Schmeier*, 28 Wis. 2d 126, 135 N.W.2d 842 (1965).

⁸ The Seidls argue WPSC violated the time limits contained in WIS. STAT. § 805.16(1)-(3), which provide:

(continued)

untimely motions under § 805.16, the Seidls contend, the circuit court's directed verdict is void.

¶19 The assumption on which the Seidls' argument rests is faulty. In their earlier arguments, the Seidls contend that the verdict and, indeed, the entire trial were legal nullities. Now, their argument assumes that both the trial and the verdict are valid. However, the verdict was properly rejected by the circuit court as not conforming to the law and jury instructions. The verdict, then, not the trial, is a legal nullity. Accordingly, there is no "verdict" to trigger the WIS. STAT. § 805.16 time limits.

II. THE SEIDL'S SUBSTANTIVE ARGUMENTS

¶20 The Seidls alternatively argue that, even if WPSC's motion is not procedurally barred, the circuit court erred by concluding a directed verdict was appropriate on the merits because there was credible evidence to support a verdict

(1) Motions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents.

(2) The time for hearing arguments on motions after verdict shall be not less than 10 nor more than 60 days after the verdict is rendered, unless enlarged pursuant to motion under s. 801.15(2)(a).

(3) If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record or the judge, or the clerk at the judge's written direction, does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.

in the Seidls' favor.⁹ The Seidls rely on the trial court's "findings" that there was credible evidence supporting their claims when it denied WPSC's motions during the course of the trial. However, the circuit court made it clear why it was denying the motion and that it would reconsider the motion later. The court was not bound by its earlier denial of the motion.

¶21 The Seidls also rely on the jury's verdict finding WPSC 54% negligent. The Seidls point out that, where more than one reasonable inference can be drawn from the evidence, the court must accept the inference drawn by the finder of fact. However, the jury did not follow instructions and, as the Seidls pointed out when they moved for a mistrial, the entire verdict was defective.

¶22 The Seidls fail to articulate with particularity what evidence the jury could have relied on to support a finding of negligence. They briefly summarize their experts' testimony,¹⁰ noting that those experts were "critical of" or "noted" deficiencies of various aspects of WPSC's system, such as the close proximity of WPSC's substations to the Seidls' farm and of WPSC's pad-mounted transformer to the Seidls' well. However, we agree with WPSC that to be "critical of" aspects of its system or to "note" features of its system, is not enough to establish negligence, nor do the Seidls explain how that evidence constitutes negligence. It is not the duty of this court to search the record for evidence to support the Seidls'

⁹ The Seidls also take issue with the manner in which the circuit court reached its conclusion that no credible evidence supported the verdict. Because we ultimately agree with the circuit court's conclusion, we need not address the circuit court's methods of reaching that conclusion. See *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm if the circuit court reached the correct result despite flawed reasoning).

¹⁰ The Seidls' summary comprises approximately three pages of its main brief. The Seidls did not conclude their case-in-chief until the eleventh trial day.

assertions. *See Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). Nor will we abandon our neutrality to articulate a cognizable theory of negligence.¹¹ *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

By the Court.—Judgment affirmed.

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

¹¹ WPSC also argues that the Seidls waived their argument that there was credible evidence upon which the jury could find in the Seidls' favor because the Seidls did not adequately brief the issue in the circuit court. However, the Seidls, at least, raised the argument in the circuit court and thus the waiver rule is not applicable.

