COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2373 **Cir. Ct. No. 2003CV157**

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

JOHN MCFAUL,

PLAINTIFF-RESPONDENT,

V.

HENRY MARTINSEN,

DEFENDANT-APPELLANT,

M.O.C., INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Henry Martinsen appeals a judgment entered upon a jury verdict finding him liable for damage to personal property John McFaul had stored in a building owned by M.O.C., Inc., a Martinsen-owned corporation. Martinsen seeks a new trial in the interest of justice pursuant to WIS. STAT. § 752.35.[1] We reject Martinsen's arguments and affirm the judgment.

BACKGROUND

¶2 In July 2000, McFaul contacted Martinsen about renting space to store his personal belongings. Martinsen directed McFaul to space he had available in a building at the former James River complex. Upon inspection, McFaul found several structural defects with the building, but was assured that the building was "high and dry." McFaul decided to rent the space, and moved in at the end of the month. Neither the date of possession, period of possession, amount of rent, nor any other terms of the agreement were discussed between the parties prior to McFaul moving his possessions into the building.

¶3 In April 2001, McFaul discovered that a significant amount of his property in the storage space had sustained water damage. Although McFaul claims he immediately notified Martinsen about the water damage, Martinsen contends he did not know about the damage until September 17, 2001, when McFaul came to remove the undamaged portion of his property from the building. McFaul asserts that on that date, he first heard of M.O.C. and, under duress, signed a "lease" identifying M.O.C. as the lessor, listing the rent at $200 per month and indicating that back rent had accrued to the sum of $2,600. The "lease" further

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

indicated that any damage to the property would be determined solely by the adjuster for the lessor's insurance company. McFaul paid the rent owed under the "lease," but no insurance coverage was ever found for his damages.

¶4 McFaul ultimately filed suit against Martinsen and M.O.C., describing the action as a "negligence claim based upon a bailment theory." Martinsen argued that he was not personally liable for damages because he was acting as head of M.O.C. in his dealings with McFaul. Martinsen also denied negligence, asserting that the relationship between the parties was one of landlord-tenant rather than bailment. Martinsen raised contributory negligence and failure to mitigate damages as affirmative defenses and further asserted a counterclaim for unpaid rent.

¶5 After a trial, the jury found that McFaul's agreement was with Martinsen rather than M.O.C. Ultimately, the jury determined that Martinsen was 70% causally negligent for the damages and awarded McFaul $36,857 in damages. Based on the apportionment of negligence, the court reduced this amount to $25,800. Martinsen filed motions after verdict seeking a new trial. The trial court never ruled on the motions and entered judgment on the verdict.

¶6 Martinsen now appeals, arguing that the real controversy has not been fully tried because the negligence issue was overshadowed by the trial court's demeanor toward Martinsen's counsel and otherwise obscured by evidence of duress that should have been excluded. Martinsen also claims that incomplete instructions and verdicts about the law of personal versus corporate liability prevented the real issue from being tried. We are not persuaded.

DISCUSSION

¶7 WISCONSIN STAT. § 752.35 provides this court with the authority to grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried." In order to establish that the real controversy has not been fully tried, Martinsen must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence that was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Martinsen "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

A. TRIAL COURT'S DEMEANOR TOWARD COUNSEL

¶8 Martinsen contends that the negligence issue was overshadowed by the trial court's demeanor toward Martinsen's counsel. At trial, defense counsel cross-examined McFaul about specific items in the "lease" signed by the parties on September 17, 2001. McFaul identified three things about the lease that he felt were unfair. Despite this testimony, defense counsel asked: "So, the only problem that you have with [the lease] is you wanted to have the opportunity to have your insurance appraiser also appraise the damage, right?" The trial court consequently admonished defense counsel during the following exchange:

> [Court]: But, counsel, your question, the only objection or problem you had with the lease doesn't accurately reflect the testimony. He identified at least three problems with the document. One –
>
> [Defense Counsel]: Judge, can I be heard outside the presence of the jury?
>
> [Court]: No, you're going to listen.
>
> [Defense Counsel]: Okay.
>
> [Court]: One, he wanted his own appraiser; two, he objected to the [clause], if there is damage; three, he indicated that he was unaware of M.O.C., Inc. So those are the three things in his testimony he already identified.
>
> Now, if you want to cover something else and say that's the only three things, then I think he's got something, you know, to say. But when you say you only said there is one thing, he said there were three things. Okay? It's pretty clear in his testimony.
>
> You may continue with your questioning.

¶9 Defense counsel's subsequent motion for a mistrial was denied. On appeal, Martinsen claims the trial court's demeanor toward Martinsen's counsel distracted the jury from deciding the negligence issue. We are not persuaded. The trial court properly corrected Martinsen's counsel in the jury's presence after counsel mischaracterized McFaul's testimony during cross-examination. *See e.g.* ***Schultz v. State***, 82 Wis. 2d 737, 264 N.W.2d 245 (1978). Moreover, the trial court instructed the jurors to disregard any impression they may have of the court's position when answering the special verdict questions. We presume that the jurors acted in accordance with this instruction, *see* ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988), and "[p]otential prejudice is presumptively erased when admonitory instructions are properly given by a trial court." *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). The trial court properly denied the mistrial motion and Martinsen fails to

establish how the claimed admonishment prevented the real controversy from being fully tried.

B. EVIDENCE OF DURESS

¶10 Several trial witnesses testified that when McFaul came to remove his undamaged property, Martinsen instructed a worker to lock the storage site's gate to prevent McFaul from leaving before he paid the rent. McFaul consequently went to Martinsen's office, and signed the lease form. At trial, McFaul testified that he signed the lease under duress, as he considered himself, his truck and his three workers to be held against their will inside the James River complex. On cross-examination, Martinsen confirmed that he ordered the gate locked with the intent to compel McFaul to pay the rent.

¶11 At the close of evidence, the trial court ruled that verdict questions about duress were unnecessary because the case was ultimately about negligence, and duress went to "the enforceability of a contract that nobody is trying to enforce." The court concluded, however: "[T]hat doesn't mean [the lease] is irrelevant, nor does it mean that evidence about people or trucks being locked in or not taking out all the property at a particular time is irrelevant."

¶12 On appeal, Martinsen contends that evidence of duress prevented the jury from fully deciding the negligence issue. Martinsen argued at trial that the lease represented the rental agreement between McFaul and M.O.C. McFaul testified, however, that he first learned of the existence of M.O.C. on the day he signed the "lease." The evidence supporting McFaul's duress claim was therefore relevant to explain why McFaul signed a lease with an entity he had not earlier been dealing with. This background ultimately supports the jury's conclusion that McFaul had actually contracted with Martinsen, despite the lease's identification

of M.O.C. as the lessor. Martinsen has, therefore, failed to establish how the challenged evidence prevented the real controversy from being fully tried.

C. PERSONAL VERSUS CORPORATE LIABILITY

¶13 Finally, Martinsen claims that incomplete instructions and verdicts about the law of personal versus corporate liability prevented the real issue from being tried. We disagree. The jury was instructed on the laws of agency and liability. The instructions and the special verdict questions allowed the jury to reach the crux of McFaul's case and decide which defendant, if any, was negligent in storing his property.[2] Martinsen nevertheless claims the jury should additionally have been instructed on two theories of concurrent corporate liability. At the instruction conference, however, Martinsen did not object to the absence of concurrent liability instructions nor did he challenge their omission on the verdict form. Generally, the failure to object to jury instructions at the pretrial conference waives the right to object to the instructions on appeal. ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988). In any event, Martinsen's position at trial was that M.O.C. alone was liable for McFaul's damages. We are, therefore, not persuaded that the absence of instructions on *concurrent* liability somehow prevented the real controversy from being fully tried.

¶14 Martinsen additionally claims that conflicting testimony regarding who may have been acting as agents for Martinsen and M.O.C. likely confused the jury, thus, preventing the real controversy from being fully decided. Evidence

[2] Question One asked the jury to decide whether McFaul's agreement to store his property was with Martinsen or with M.O.C. Questions Two and Three asked the jury to decide whether the party chosen in Question One was negligent in storing McFaul's property, and whether that negligence caused the damage to McFaul's property.

regarding whether Martinsen had agents was integral to determining liability for the damage to McFaul's property. Further, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Because the record demonstrates that the issues of negligence and liability were fully and fairly tried, we decline to exercise our discretion to grant a new trial in the interest of justice.

By the Court.—Judgment affirmed.

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