COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-1891 **Cir. Ct. No. 97-CV-241**

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

STEVEN DERKSON,

PLAINTIFF-APPELLANT,

MELANIE J. DERKSON, ROBERT M. DERKSON, A MINOR AND LAINE S. DERKSON, A MINOR, BY THEIR GUARDIAN AD LITEM, ERIC S. DARLING,

INTERVENING PLAINTIFFS,

V.

TROY HAARSTICK, HOLIDAY INN SUN SPREE RESORT, AND NORTHBROOK PROPERTY & CASUALTY,

DEFENDANTS-RESPONDENTS,

SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Steven Derkson has appealed from a judgment awarding him $343,850 in damages and costs following a jury trial. Judgment was entered against the respondent, Troy Haarstick. The judgment dismissed Derkson's claims against two other respondents, Holiday Inn Sun Spree Resort (the resort) and its insurer, Northbrook Property & Casualty. We affirm the judgment.

¶2 This action arises from injuries suffered by Derkson when he was struck by Haarstick, a catering manager for the resort. Derkson suffered a broken nose as a result of the blow, and subsequently underwent two surgeries. The altercation occurred inside an elevator at 1:30 a.m. on December 22, 1996. Derkson had been attending a Christmas party sponsored by Shock Electronics at the resort. Haarstick had scheduled and arranged both the Shock Electronics party and a wedding reception for his friends, Dee Dee and John Anderson, which was being held at the same time as the Shock Electronics party. It is undisputed that Haarstick was intoxicated when he struck Derkson.

¶3 Derkson sued both Haarstick and the resort. After a jury trial, the jury returned a special verdict finding that Haarstick committed a battery when he struck Derkson, that he was not acting in self-defense, and that his conduct caused injury to Derkson. In answer to question number 4 of the special verdict, it found that the resort was negligent in the training or supervision of Haarstick regarding the consumption of alcohol while on duty. However, in answer to special verdict question number 5, it found that the negligence of the resort was not a cause of the conduct of Haarstick on December 22, 1996. In answer to special verdict question

numbers 6 and 7, it further found that Derkson was negligent with respect to his own safety and well being, and that his negligence was a cause of his injuries.

¶4 Based upon its earlier answers, the jury did not answer special verdict question number 8, allocating negligence between the resort and Derkson. It awarded Derkson damages of $23,250 for past medical care expenses, $10,200 for past loss of earnings, and $400,000 for past and future pain, suffering and disability.

¶5 On motions after verdict, the trial court granted judgment dismissing Derkson's claims against the resort and its insurer. Dismissal was based upon the jury's verdict. In addition, the trial court granted a motion to dismiss which it had previously taken under advisement, determining that the resort was exempt from liability under WIS. STAT. § 125.035 (1999-2000).[1] The trial court also granted a motion for remittitur of the jury's award of $400,000 for past and future pain, suffering and disability. Pursuant to WIS. STAT. § 805.15(6), it reduced the award to $300,000, and gave Derkson the option of accepting the reduced amount, or accepting a new trial on this element of damages. Derkson accepted the reduced amount.

¶6 Derkson's first argument on appeal is that the trial court erred when it denied his motion to change the jury's answers to special verdict questions 5, 6, 7, and 8. He argues that the jury's answers to questions 4 and 5 are inconsistent, and that the evidence does not support the jury's answers to questions 5, 6, 7 and 8.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

¶7 A verdict is inconsistent when the jury's answers are logically repugnant to one another. ***Imark Indus., Inc. v. Arthur Young & Co.***, 148 Wis. 2d 605, 623, 436 N.W.2d 311 (1989). A motion to change a jury's answers challenges the sufficiency of the evidence to sustain the answers given. WIS. STAT. § 805.14(5)(c). In considering a motion to change the jury's answers, the trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). If there is any credible evidence to support the jury's findings, a trial court is not justified in changing the jury's answers. ***Id.*** The trial court must defer to the jury's assessment of the credibility of witnesses and the weight to be given their testimony, and must accept the reasonable inferences drawn by the jury. ***Id.*** When there is any credible evidence to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict … must stand." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995) (citation omitted). On appeal, we are guided by these same rules. ***Richards***, 200 Wis. 2d at 671.

¶8 The jury's findings in special verdict questions 4 and 5 are not inconsistent. Credible evidence supports its findings that the resort was negligent in the training or supervision of Haarstick regarding the consumption of alcohol while on duty, but that its negligence was not a cause of Haarstick's conduct on December 22, 1996.

¶9 Derkson contends that it is impossible to reconcile a finding that the resort was negligent in the training and supervision of Haarstick with a finding

that its negligence was not a cause of his injuries.[2] We disagree. When a claim is made for negligent training or supervision, the causal question is whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee, which in turn caused the plaintiff's injury. ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis. 2d 250, 262, 580 N.W.2d 233 (1998). There must be a nexus between the negligent training or supervision and the act of the employee. ***Id.*** The jury must first determine whether the wrongful act of the employee was a cause-in-fact of the plaintiff's injury. ***Id.*** Second, it must determine whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee. ***Id.***

¶10 Credible evidence permitted the jury to find that the resort was negligent in the training and supervision of Haarstick because it did not have a written employee manual addressing the consumption of alcohol while on duty. However, the jury could also reasonably find that the resort's negligence was not a cause of Haarstick's striking Derkson. Based upon the evidence, the jury could have found that Haarstick was not on duty as catering manager after 6:15 p.m. on December 21, 1996, and that he was at the resort simply as an invited guest at the

[2] In conjunction with this argument, Derkson argues that the jury instructions must have confused the jury on the issue of causation. Beyond the fact that this is pure speculation on Derkson's part, Derkson did not object to the language of the causation instructions as given, and thus waived any right to object to them on appeal. ***McGarrity v. Welch Plumbing Co.***, 104 Wis. 2d 414, 417 n.2, 312 N.W.2d 37 (1981).

Anderson wedding.[3] The jurors could thus have concluded that Haarstick's conduct at 1:30 a.m. the following morning was unrelated to the resort's training and supervision of him in his employment.

¶11 Similarly, based upon evidence indicating that almost all of the alcohol consumed by Haarstick on the night of the altercation was consumed as a private guest from a tap made available to guests at the Anderson wedding reception, the jury could have found that his consumption of alcohol was not because of any negligence with respect to the resort's training and supervision, but simply because Haarstick had chosen to drink to the point of intoxication as an invited guest at a private wedding. Finally, the jury could also have found that even if the resort's negligent training or supervision was a cause of Haarstick's intoxication, it was not a substantial factor and therefore not a cause of his conduct in becoming violent and striking Derkson. The jury's answers to special verdict questions 4 and 5 thus were not inconsistent, and were supported by credible evidence.

¶12 The jury's answers to special verdict questions 6 and 7 were also supported by credible evidence. Evidence indicated that Derkson made a derogatory comment about Haarstick while on the elevator. Other testimony indicated that Derkson struck Haarstick in the groin. The jury could have

[3] In his appellant's brief, Derkson states that "[i]t was conceded that [Haarstick] was an employee at the time of the incident." However, this "concession" was made in the context of a motion to dismiss by the resort related to the issue of whether Haarstick was acting outside the scope of his employment as a matter of law when he struck Derkson. In conjunction with this motion, the resort argued that even if Haarstick was an employee at the time he struck Derkson, his act of striking Derkson was outside the scope of his employment. The "concession" regarding employment was made only for purposes of the motion to dismiss, which was granted. It was not a concession related to Derkson's claim of negligent supervision and training.

concluded that such conduct occurred, and that it was provocative and negligent on Derkson's part, contributing to his injuries even though insufficient to justify Haarstick's reaction.

¶13 Because credible evidence supported the jury's answers to special verdict questions 5 through 7, the jury properly refrained from allocating the causal negligence in special verdict question 8. The trial court also properly denied Derkson's motion to change the answers to questions 5 through 8.

¶14 Derkson's next argument is that the trial court erred when it failed to direct a verdict in his favor on special verdict question 5. As with a motion to change a jury's answers, a motion for a directed verdict may not be granted unless, considering all credible evidence and the reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to support a finding in favor of such party. ***Richards***, 200 Wis. 2d at 670. As already discussed, credible evidence supported the jury's finding that the resort's negligence was not a cause of Haarstick's conduct on December 22, 1996. Derkson was therefore not entitled to a directed verdict as to special verdict question 5.[4]

[4] In addressing this argument, we note that in his motions after verdict, Derkson moved for judgment notwithstanding the verdict, not a directed verdict, as to special verdict question 5. However, his sole argument in support of the motion was the alleged insufficiency of the evidence to support the jury's answer. His argument thus reflected a misunderstanding as to the nature of a motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law. ***Logterman v. Dawson***, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994). Because the facts as found in this case supported dismissal of the action against the resort, Derkson was not entitled to either judgment notwithstanding the verdict or a directed verdict.

¶15 Derkson argues that, in the alternative, the trial court should have granted him a new trial in the interest of justice. A trial court may grant a new trial in the interest of justice when the jury's findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. ***Sievert v. Am. Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). The trial court's decision is discretionary and, because the trial court is in the best position to observe and evaluate the evidence, will be afforded great deference by this court. ***Id.***

¶16 Evidence supporting the jury's verdict has been set forth above. Based upon that evidence, the trial court could reasonably reject Derkson's claim that the verdict was contrary to the great weight and clear preponderance of the evidence, and acted within its discretion in denying the motion for a new trial.

¶17 Because the trial court properly dismissed the action against the resort and its insurer based upon the jury's answers to the special verdict, we need not address the issue of whether the resort was also exempt from liability under WIS. STAT. § 125.035. The only remaining issues relate to the trial court's granting of the motion for remittitur.

¶18 Derkson argues that the trial court lacked jurisdiction to address Haarstick's motion for remittitur because Haarstick did not file a brief, affidavits, or other documents in support of it. Citing WIS. STAT. § 802.01(2)(b), he contends that Haarstick was required to file such materials with his motion under WIS. STAT. §§ 801.15(4) and 805.16(1). He contends that supporting materials were also required to be filed under Waukesha County Circuit Court Civil Rule 5.4 (2001).

¶19 Waukesha County Circuit Court Civil Rule 5.4 applies to motions for summary judgment or motions to dismiss under WIS. STAT. § 802.06. It has no applicability to motions after verdict.

¶20 WISCONSIN STAT. §§ 801.15(4) and 802.01(2)(b) are similarly inapplicable. Section 801.15(4) provides simply that if a motion is supported by an affidavit, the affidavit shall be served with the motion. It does not compel the filing of an affidavit. Likewise, § 802.01(2)(b) mandates simply that "[c]opies of all records and papers upon which a motion is founded, except those which have been previously filed or served in the same action or proceeding, shall be served with the notice of motion and shall be plainly referred to therein." Haarstick's motion for remittitur was based on the testimony at trial, not specific records and papers. Since nothing in § 802.01(2)(b) or WIS. STAT. § 805.16(1) mandates that supporting papers or affidavits be filed with motions after verdict, no basis exists to conclude that the trial court lacked jurisdiction to address the motion for remittitur.

¶21 Derkson's final argument is that the trial court erroneously exercised its discretion by reducing damages for past and future pain, suffering and disability from $400,000 to $300,000. Remittitur was ordered pursuant to WIS. STAT. § 805.15(6), which provides that "[i]f a trial court determines that a verdict is excessive …, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount." This rule permits the trial court to set aside a damages award which it determines is too large to be supported by the evidence. ***Wester v. Bruggink***, 190 Wis. 2d 308, 326, 527 N.W.2d 373 (Ct. App. 1994).

¶22 In determining whether an award is excessive, the trial court is required to view the evidence as a whole, and to consider it in the light most favorable to the plaintiff. ***Id.*** "Because the trial court has the advantage over the appellate court of the opportunity to view the testimony and the injured person, we will reverse the trial court's determination that the damages are excessive only if we find a misuse of discretion." ***Id.*** An erroneous exercise of discretion will not be found if there exists a reasonable basis for the trial court's decision after resolving any direct conflicts in the testimony in favor of the party seeking to avoid remittitur. ***Id.*** at 327.

¶23 The trial court reasonably determined that the evidence did not support an award of $400,000 for pain, suffering and disability. It noted that expert testimony was presented which indicated that Derkson's second surgery was necessitated by his failure to follow up on medical care recommended after his first surgery. It also noted that the jurors' failure to award Derkson all of his medical expenses indicated that they accepted this testimony as true. While acknowledging that credible evidence substantiated a considerable award for pain and suffering, it also cited its own experience in presiding over personal injury actions, concluding that the evidence in this case did not substantiate a $400,000 award for pain and suffering arising from a broken nose. It therefore offered Derkson the option of a new trial on this portion of his damages, or an award reduced to $300,000. Because the trial court had the opportunity to hear the testimony, observe Derkson, and consider the extent of the injuries attributable to Haarstick's conduct, it acted within the scope of its discretion in making this determination.

By the Court.—Judgment affirmed.

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