**COURT OF APPEALS DECISION DATED AND FILED**

**August 21, 2007**

**David R. Schanker**
**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. 2006AP2045**

**Cir. Ct. No. 2004CV6004**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT I**

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**MARGARET GUTTER,**

**PLAINTIFF-APPELLANT,**

**BLUE CROSS BLUE SHIELD OF WISCONSIN AND COMPCARE HEALTHCARE SERVICES INS. CORP.,**

**INVOLUNTARY-PLAINTIFFS,**

**V.**

**GREAT ATLANTIC & PACIFIC TEA COMPANY D/B/A KOHLS FOOD AND CRAWFORD & COMPANY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 WEDEMEYER, J. Margaret Gutter appeals *pro se,* from an order entered on a jury verdict finding that The Great Atlantic & Pacific Tea Company, Inc. d/b/a Kohl's Food Store (Kohl's) was not negligent in an incident that occurred at one of their grocery stores. Gutter claims the trial court erred in entering judgment on the jury verdict for Kohl's. Gutter's arguments raise five claims:[1] (1) there was insufficient evidence to support the jury's verdict; (2) the jury should have found Kohl's negligent under *res ipsa loquitor*; (3) the jury verdict is inconsistent; (4) the jury verdict shows "prejudice" and is therefore "perverse"; and (5) the trial court erred in dismissing her motion for a waiver of costs under WIS. STAT. § 814.29 (2005-06).[2] Because the trial court properly found sufficient evidence to support the jury's verdict as required under WIS. STAT. § 805.15, because Gutter's arguments for *res ipsa loquitor*, inconsistent verdict and perverse verdict were not raised in the trial court and cannot now be argued on appeal, and because the trial court did not err in denying Gutter's motion for a waiver of transcription fees, we affirm.

## BACKGROUND

¶2 On July 9, 2004, Gutter filed an action against Kohl's claiming negligence for injuries she sustained when a bag of cans fell on her left foot during checkout. Gutter alleges the checkout clerk, Stacey Carter, dropped the bag of cans on her left foot while Carter was attempting to reach across the checkout counter and place the bag in Gutter's shopping cart. Carter, on the other hand,

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[1] Even though Gutter does not separately address each claim, we will address all arguments that are raised in her brief.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

testified that the bag fell after she placed it on a ledge at the counter and began to walk around the counter to assist Gutter by placing the bag in the cart.[3] Carter claimed she decided to walk around the counter because she could not successfully reach the cart. Carter could not give any reason as to why the bag of cans fell off the ledge. At the close of trial, the jury found neither Kohl's, through the acts of its employee, Carter, nor Gutter were negligent.[4]

¶3 On June 5, 2006, Gutter filed a motion for a new trial. Gutter argued that the verdict was contrary to law, contrary to the evidence, and contrary to the great weight of the evidence because the evidence showed that only Carter handled the bag of cans and the jury had to find Carter negligent because the bag would not have fallen if she was not negligent. The trial court denied the motion, finding credible evidence to support the jury's verdict and dismissed Gutter's complaint with prejudice and with costs after a motion hearing on June 26, 2006.

¶4 On July 3, 2006, Gutter filed a motion for reconsideration raising the same argument—that the bag of cans could only have fallen on her left foot due to negligence and Kohl's had to be found negligent because its employee, Carter, was the only individual to handle the bag. The trial court again denied the motion finding credible evidence to support the jury's findings. Gutter now appeals.

## DISCUSSION

[3] Carter was unable to appear at trial so her testimony from a prior deposition was read to the jury and admitted into evidence.

[4] The jury responded "No" to Special Verdict Questions 1 and 2. Question 1 asked: "At the time of the accident on July 12, 2001, was Kohl's Food Store, by and through its employee Stacey Carter, negligent with respect to handling of the groceries?" Question 2 asked: "At the time of the accident on July 12, 2001, was Margaret Gutter negligent with respect to her own safety?"

*A. Sufficiency of Evidence*

¶5 The first issue in this case is whether the trial court properly denied Gutter's motion for a new trial. Under WIS. STAT. § 805.15(1):

> [a] party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of the evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.

A jury verdict, however, may not be vacated if "there is any credible evidence to support the verdict" viewed in "the light most favorable to the prevailing party." ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 476, 543 N.W.2d 277 (1996).

¶6 The trial court has discretion in its decision to grant or deny a motion for a new trial and the decision will be upheld unless there is an erroneous exercise of discretion. ***Id.*** When a motion for a new trial is denied and the court approves the jury's findings, the only issue to be considered on appeal is "whether there is any credible evidence that, under any reasonable view, supports such findings." ***Olson v. Milwaukee Auto. Ins. Co.***, 266 Wis. 106, 109, 62 N.W.2d 549 (1954).

¶7 The testimony at trial conflicted. In such situations, the court "must recognize that it was for the jury to determine where the truth lies." ***Id.*** at 110. The jury heard two stories regarding the incident: (1) the bag of cans fell on Gutter's left foot while Carter reached over the counter to put the bag in the cart; and (2) the bag fell on Gutter's left foot from the ledge as Carter was walking around the counter to place the bag in Gutter's cart. Gutter incorrectly believes that both versions required the jury to find Kohl's negligent because there was no evidence that she was negligent, Carter was the only individual to handle the bag

of cans, and the bag fell on her left foot only as a result of negligence. Gutter, however, fails to recognize that the jury could have found neither she nor Carter was negligent.

¶8 In determining negligence, the jury was instructed:

> A person is negligent when he or she fails to exercise ordinary care. Ordinary care is the degree of care which the great mass of mankind exercises under the same or similar circumstances. A person fails to exercise ordinary care, when, without intending to do any harm, he or she does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject a person or property to an unreasonable risk of injury or damage.

WIS JI—CIVIL 1005. The only evidence Gutter provides for Carter's mishandling of the bag comes from Gutter's testimony, and the jury was not required to believe her version of the story. Accordingly, it was well within the jury's province to find that Carter exercised ordinary care when she placed the bag of cans on the ledge. As the trial court stated in its decision:

> The evidence in this case did not provide the jury with a clear diagram or picture of the check-out counter nor did the evidence provide a clear description of how the bag fell on plaintiff's foot. … [The jury] was not required to find that someone was necessarily negligent and that the negligent person was necessarily the store clerk.[5]

(Footnote added.). Accordingly, based on the record, and the evidence, or lack thereof, we cannot overturn the verdict rendered by the jury in this case. Further, it was Gutter's burden to prove that Carter was negligent, and the jury could find

[5] It should also be noted that two jurors dissented from the jury's answer to Special Verdict Question 1 in which Kohl's was found not negligent.

from the evidence that the bag just fell, without anyone being negligent. Based on the verdict of the jury, Gutter failed to satisfy that burden.

*B. Res Ipsa Loquitor*

¶9 In Gutter's brief, she argues that the jury was obligated to find Kohl's negligent because Carter "had exclusive control over the bag of cans." She compares her case to ***Welch v. Neisius***, 35 Wis. 2d 682, 151 N.W.2d 735 (1967), where a bag of fertilizer fell off of the defendant's truck onto the plaintiff's head and the issue was whether it was proper for the trial court to instruct the jury on the *res ipsa loquitor* doctrine. Although Gutter raised the res ipsa loquitor claim in motions after verdict, she neglected to request the *res ipsa loquitor* instruction at the jury instruction conference and thereby waived her right to raise error on this issue on appeal. *See* ***Suchomel***, 288 Wis. 2d 188, ¶10; WIS. STAT. § 805.13(3) ("Counsel may object to the proposed instructions … on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions ….").

*C. Inconsistent/Perverse Verdict*

¶10 Gutter also contends that the jury verdict was "inconsistent" and "perverse." We disagree. An inconsistent verdict occurs when the jury's answers are "logically repugnant to one another." ***Fondell v. Lucky Stores, Inc.*****,** 85 Wis. 2d 220, 228, 270 N.W.2d 205 (1978). The verdict was not inconsistent simply because it did not apportion negligence of the parties. The jury did not agree with Gutter's theory as to liability. Such does not render the jury's verdict "inconsistent." *See* ***Seif v. Turowski*****,** 49 Wis. 2d 15, 22-23, 181 N.W.2d 388 (1970). Her claim in this regard is frivolous.

¶11 Gutter also claims that the low damage award, together with its liability determination, rendered the verdict perverse. We reject such contention. "A verdict is perverse when the jury clearly refuses to follow the direction or instruction of the trial court upon a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Redepenning v. Dore***, 56 Wis. 2d 129, 134, 201 N.W.2d 580 (1972) (footnote omitted). The jury was instructed to answer the damage questions regardless of how they answered the liability questions. We have not been presented with anything to suggest this verdict was perverse.

*D. Waiver of Costs*

¶12 Gutter's final contention that she is indigent and entitled to a waiver of transcript fees also fails. Under WIS. STAT. § 814.29, an indigent party may request a waiver of transcription fees. The statute states in relevant part:

> (1)(a) … [A]ny person may commence, prosecute or defend any action or special proceeding in any court, or any writ of error or appeal therein, without being required to give security for costs or to pay any service or fee, upon order of the court based on a finding that because of poverty the person is unable to pay the costs of the action or special proceeding, or any writ of error or appeal therein, or to give security for those costs.
>
> (b) A person seeking an order under par. (a) shall file in the court an affidavit in the form prescribed by the judicial conference, setting forth briefly the nature of the cause, defense or appeal and facts demonstrating his or her poverty.

¶13 The trial court denied Gutter's motion for waiver of costs because she did not follow the proper procedure outlined in paragraph (b) and failed to file an affidavit with the court. The trial court went on to state that even if Gutter did

follow the proper procedure and file an affidavit, the motion would still have been denied for failing to set forth an "arguably meritorious" claim, quoting ***State ex rel. Girouard v. Jackson County Circuit Court***, 155 Wis. 2d 148, 159, 454 N.W.2d 792 (1990).[6]

¶14 We agree with the trial court's ruling. Gutter failed to file an affidavit with the trial court and follow the proper procedure to obtain a waiver of transcript fees as required under WIS. STAT. § 814.29(1)(b). Moreover, Gutter has neglected to provide this court with any substantive argument as to why the trial court erred in denying her motion. The merit of Gutter's claim does not need to be addressed.

## CONCLUSION

¶15 In sum, the trial court did not err when it entered judgment on the jury's verdict because there was sufficient credible evidence to support the jury's findings. Furthermore, Gutter cannot argue issues on appeal she failed to raise in the trial court. Specifically, *res ipsa loquitor*, inconsistency and perversity were all waived. Finally, Gutter failed to follow the procedure required by WIS. STAT. § 814.29(1)(b) to receive a waiver of costs. For these reasons, the order of the trial court is affirmed.[7]

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[6] It should further be noted that a meritless assertion by a putative appellant will not furnish a foundation for a judicially ordered waiver of fees. The individual must be found to be indigent by the court, and the person must present a claim upon which relief can be granted. ***State ex rel. Rilla v. Dodge County Cir. Ct.***, 76 Wis. 2d 429, 433, 251 N.W.2d 476 (1977). (per curiam). We stated there, "[T]he action [must be] arguably meritorious."

[7] Gutter raises for the first time in her reply brief a claim that the trial court erred in allowing her attorney to withdraw. We decline to address this issue. *See* ***In re Estate of Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

*By the Court.*—Order affirmed.

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