**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 11, 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. 2006AP748** **Cir. Ct. No. 2002CV40**

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

---

**DONALD B. EGELSEER AND RACHEL A. EGELSEER,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**BRAD BUKSYK, D/B/A ABSOLUTE QUALITY CONSTRUCTION,**

**DEFENDANT-APPELLANT,**

**TREVOR DOLLAR, D/B/A T.G. DOLLAR CONSTRUCTION AND AUTO-OWNERS INSURANCE COMPANY, A FOREIGN CORPORATION,**

**DEFENDANTS-RESPONDENTS,**

**MAPLE VALLEY MUTUAL INSURANCE COMPANY, A WISCONSIN CORPORATION,**

**DEFENDANT-CROSS-PLAINTIFF.**

---

APPEAL from an order of the circuit court for Florence County: ROBERT A. KENNEDY, JR., Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Brad Buksyk appeals an order granting Donald and Rachel Egelseer a new trial after jury verdicts in a negligence action. Buksyk contends the circuit court erroneously exercised its discretion and failed to comply with statutory time limits. We agree and reverse the order. We remand to the circuit court with the directions specified below.[1]

## BACKGROUND

¶2 This case arose from a fire that damaged a building owned by the Egelseers. The building was a house built in the nineteenth century that the Egelseers decided to restore. The Egelseers hired Buksyk as their restoration contractor, and Buksyk engaged someone named Trevor Dollar to perform some masonry work on the property. The masonry work was being performed in the winter, and to prevent water used in the masonry process from freezing and damaging the mortar, a propane heater was used in the house to keep temperatures above freezing.

[1] The Egelseers have also filed a motion for fees and costs, alleging that this appeal is frivolous. That motion is denied.

¶3 The fire occurred during the evening of February 5, 2001. In June 2002, the Egelseers filed suit against Burksyk and Dollar,[2] alleging that the fire resulted from their negligent operation of the propane heater.

¶4 The case culminated in a four-day jury trial, which ended with verdicts on December 16, 2005. The following jury findings are relevant to this appeal: The defendants were not negligent; the Egelseers were negligent but their negligence was not the cause of the fire; and the building was not a historic structure.[3] On December 27, 2005, the Egelseers filed a motion for a new trial, alleging these findings were contrary to the great weight of the evidence.

¶5 The circuit court held two hearings related to the Egelseers' motion. At the first hearing on February 14, 2006, the court did not address the motion for a new trial, but instead changed the jury's answer on the question of whether the Egelseers were negligent from "yes" to "no." After making this change, the court postponed its hearing on the motion for a new trial until March 14.

¶6 At the March 14 hearing, the circuit court granted the Egelseers' motion for a new trial, contingent upon the Egelseers paying $8,000 to the county. The court concluded that the case was not fully tried and the interests of justice favored a new trial. This decision was based on Mr. Egelseer's absence from trial

[2] Dollar is not a party to this appeal and will not be mentioned further in this opinion.

[3] Earlier, the circuit court apparently concluded that, if the Egelseers could show the building was historic, they would be entitled to full restoration costs, unlimited by the fair market value of the property or reasonable costs of repair. This issue is not before us.

and the court's perception that public policy favored preserving historic buildings.[4]

¶7 A written order in accordance with the court's decision was filed on March 21, 2006, and the Egelseers tendered $8,000 to the county for their new trial. Buksyk sought leave to file an interlocutory appeal of the circuit court's order for a new trial, which we granted May 19, 2006.

## DISCUSSION

¶8 On appeal, Buksyk argues that the circuit court erroneously exercised its discretion, though he acknowledges he does not fully understand the basis of the court's decision. Buksyk also contends the court lost competency to decide the Egelseers' motion because it failed to comply with the time limits of WIS. STAT. § 805.16.[5]

### *A. The Circuit Court's Exercise of Discretion*

¶9 The applicable statute for granting a new trial after a verdict is WIS. STAT. § 805.15(1), the relevant portion of which states:

> 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 the law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice. Motions under this subsection may be heard as prescribed in

[4] Before trial, the Egelseers' attorney noted that Mr. Egelseer was absent due to a health condition. The attorney did not object to going forward without Mr. Egelseer, and neither did the other parties. The parties agreed to read Mr. Egelseer's deposition testimony into the record and go forward with the trial.

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

> s. 807.13. Orders granting a new trial on grounds other than the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

¶10 A circuit court's decision to grant a new trial is discretionary. ***Sievert v. American 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). We will affirm a circuit court's discretionary determination if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶11 The circuit court ordered a new trial in the interest of justice because the case was not fully tried.[6] The court's decision rested upon two confusing determinations. First, the court concluded that, given the "legislative function of the jury," Mr. Egelseer's absence was contrary to principles of democracy. Second, the court concluded the Egelseers' case should get "priority" for a new trial because public policy favors private restoration of historic structures.

¶12 The court's analysis of whether the case was fully tried began by noting that Mr. Egelseer was not present at trial. The court did not believe Mr. Egelseer's absence deprived the jury of any evidence, noting that "I don't see any factual information that Mr. Egelseer could have added to the case that was not already in by somebody else." However, the court went on to note, "this is not the type of case that is based purely on fact. It is based on policy."

[6] The circuit court also discussed the weight of the evidence, which was the basis asserted in the Egelseers' motion. However, the court decided a new trial could not be granted on that ground.

¶13 The court's perception that the jury was deciding a policy question was premised on its role in determining whether the Egelseers' building was historic. While the Egelseers' building had no official designation as historic, the court noted that the jury was effectively acting in the capacity of a town landmarks commission. In the court's view, the jury was acting as a "mini legislature" to determine whether the Egelseers' building was historic, and in doing so, it was making a policy as well as a factual determination.

¶14 In an apparent reference to the democratic process, the court stated "[Mr. Egelseer] wasn't there … to participate in the policy debate. This is a democracy. And we all should be there…." and "I think that every vote counts. … Everybody should have a say. The policy reasons are the only reason why the jury ruled against [Mr. Egelseer]." In the course of determining whether the case was fully tried, the court integrated into its analysis the question of whether the case should get "priority" for a new trial based on public policy, stating "because one of [the] parties wasn't here does that mean that the case wasn't fully and fairly tried? It depends on how significant the case is."

¶15 The court's "priority" analysis was based on a United States Supreme Court decision, ***Thermtron Prods., Inc. v. Hermansdorfer***, 423 U.S. 336 (1976). In ***Thermtron Products***, the court in the Eastern District of Kentucky remanded a diversity case back to state court because of the district court's heavy workload. ***Id.*** at 338-39. Based on its interpretation of a federal statute, the Supreme Court concluded that the district court exceeded its authority in doing so. ***Id.*** at 344-45. In a footnote, the Court quoted language from the district court's memorandum opinion and order, which stated:

> At the close of business on February 28, 1974 there were pending on the dockets for which this Court has primary

> responsibility a total of eighty (80) criminal actions and three hundred ninety-four (394) civil actions. These cases have been assigned various priorities. The first priority is granted criminal actions. Social Security and Black Lung cases * have a priority second only to criminal cases. A third priority is granted those actions in which the United States is a party. The lowest priority, as a matter of necessity, is assigned private civil actions. Consequently, the period between the filing of such actions and the time in which they are assigned for trial must, regrettably, continually be extended. (Citation omitted.)
>
> *At the present time the Eastern District of Kentucky is experiencing an influx of Black Lung related actions. The Department of Health, Education and Welfare predicts that a total in excess of four thousand (4,000) of these actions will ultimately be filed in this District.

***Id.*** at 340-41 n.3. The above language was the basis for the circuit court's inquiry into whether, for public policy reasons, this case should get "priority" for a new trial.

¶16 Applying this mysterious "priority" analysis, the court elevated this case above other civil disputes by referring to a 1987 Wisconsin session law that included legislative findings suggesting that private actors' roles in the preservation of historic structures is important.[7] Before taking arguments from the parties, the court framed the issue for the Egelseers' attorney as follows: "[y]ou have to show that the type of dispute you got which is based on this renovation project is recognized by the legislature as so significant that we should hear that one as opposed to other matters that may come before the court." The court noted that the "legislation … is so narrowly tailored to this case it fits like a glove."

[7] During the telephonic motion hearing on March 14, the court faxed a copy of these legislative findings to the parties.

Seemingly, the court believed Mr. Egelseer's case was entitled to "priority" for a new trial:

> aren't there very significant policies, those that somebody goes out and spends a fortune that they are not going to get back in the public interest? Why wouldn't that case get higher priority? Why wouldn't it be up with the black lung or one of the type of cases that we should be more willing to hear?

¶17 From the circuit court's analysis, we cannot conclude the court examined the relevant facts or applied a proper standard of law. *See* ***Loy***, 107 Wis. 2d at 414-15. And while the court did demonstrate its rationale on the record, that rationale was not reasonable and could not lead to a reasonable conclusion. *See* ***id.***

¶18 We begin by noting the circuit court had no legitimate basis for concluding that this case should be given priority for a new trial based on policy reasons. The Supreme Court case relied upon by the circuit court has nothing to do with granting a new trial. ***Thermtron Products*** dealt with a federal district court's power to remand cases to state court to lighten its workload. *See* ***Thermtron Prods.***, 423 U.S. at 337. The footnote relied upon by the circuit court only discusses the Eastern District of Kentucky's scheduling priorities. ***Id.*** at 340 n.3. It does not remotely imply any priority for granting a new trial where one has already taken place. Similarly, because there was no basis for granting "priority" for a new trial in light of the case's perceived importance, there was also no basis for considering the legislative findings that seemed to drive the circuit court's analysis.

¶19 Further, the court's conclusion that Mr. Egelseer's absence, combined with the legislative function of the jury, resulted in the case not being

fully tried is unreasonable. There appears to be no basis for concluding that Mr. Egelseers' absence had any effect on the trial or the jury's decision.

¶20 Moreover, the circuit court's reasoning that Mr. Egelseer was effectively disenfranchised because he was unable to participate in a legislative policy debate is thoroughly perplexing. We are unaware why the circuit court believed the jury had authority to perform a legislative or policy-making function in the first place. While the court references WIS. STAT. § 60.64, which gives towns power to create landmarks commissions to designate historic landmarks and establish historic districts, we know of no authority for imparting a jury with such powers. Because Buksyk is not appealing the court's jury instruction, we do not address it further, except to conclude the court erred when relying on any perceived policy-making function of the jury as a basis for granting a new trial.

*B. Time Limits of WIS. STAT. § 805.16*

¶21 Additionally, the order must be reversed because the circuit court lost competency to decide the Egelseers' motion for a new trial when it failed to comply with the time limits of WIS. STAT. § 805.16. Relying on WIS. STAT. § 805.16(2) and (3), Buksyk contends the court failed to hear the motion within sixty days of the verdict and the court did not effectively decide the motion within ninety days.

¶22 The relevant portions of WIS. STAT. § 805.16 state:

> (2) The time for hearing arguments on motions after verdict shall not be 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.

When a court fails to comply with the time limits of § 805.16, it loses competency to decide a motion after verdict. *See, e.g.,* ***Jos. P. Jansen Co. v. Milwaukee Area Dist. Bd. of Vocational, Technical & Adult Educ.***, 105 Wis. 2d 1, 7, 10, 312 N.W.2d 813 (1981); ***Alberts v. Rzepiejewski***, 18 Wis. 2d 252, 256-57, 118 N.W.2d 172 (1962); ***Ahrens-Cadillac Oldsmobile v. Belongia***, 151 Wis. 2d 763, 766-67, 445 N.W.2d 744 (Ct. App. 1989).

¶23 Buksyk argues the court's March 14 hearing on the new trial motion was not within sixty days of the verdicts. He also argues the ninety-day time limit for deciding the motion was violated because the written order for the new trial was not entered until after ninety days. Further, regarding the ninety-day time limit, Buksyk argues the court's order for a new trial was not effective within ninety days because it was contingent upon the Egelseers paying $8,000 to the county, which did not occur within ninety days of the verdicts.

¶24 Here, the jury verdicts were rendered on December 16, 2005. While the court held a hearing within sixty days on February 14, it did not address the new trial motion at that hearing, instead choosing to change the jury's verdict on the question of the Egelseers' negligence. On March 14, within ninety days but after sixty days, the court held its hearing on the new trial motion and rendered its decision. The written order was entered March 21, more than ninety days after the verdicts, and the Egelseers' check tendering $8,000 was also dated March 21.

¶25 We agree that the circuit court lost competency to hear and decide the Egelseers' new trial motion when it did not hear the motion within sixty days of the verdicts pursuant to WIS. STAT. § 805.16(2). There is no indication that a

motion to extend the time limits was ever filed or granted. *See* WIS. STAT. §§ 805.15(2) and 805.16(2). Because the court lost competency to proceed with the motion when it did not comply with the sixty-day time limit, we do not address whether it also failed to comply with the ninety-day time limit.

## CONCLUSION

¶26 The circuit court's reasoning for granting a new trial constituted an erroneous exercise of discretion. Additionally, the court failed to comply with the time limits of WIS. STAT. § 805.16 and therefore lost competency to address the motion. As such, we reverse the circuit court's order granting a new trial and remand with directions to enter judgment in accordance with the jury's verdicts as amended by the court at its February 14 ruling.

*By the Court.*—Order reversed and cause remanded with directions.

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