COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1236 **Cir. Ct. No. 99-CV-1409**

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

DR. KEITH A. BROWN,

PLAINTIFF-APPELLANT,

PRIMECARE HEALTH PLAN, INC.,

SUBROGATED-PLAINTIFF,

V.

CLASSIC INNS OF WISCONSIN, INC., A/K/A THE INN AT PINE TERRACE, AND SOCIETY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Dr. Keith A. Brown has appealed from a judgment entered after a jury trial, dismissing his complaint against the respondents, Classic Inns of Wisconsin, Inc., and its insurer, Society Insurance Company. We affirm the judgment.

¶2 This action arises from injuries suffered by Brown in a fall at the Inn of Pine Terrace in Oconomowoc (the Inn) in November 1996. Brown was injured when he fell on a pool cover while walking through the pool area in an attempt to gain access to the Inn. His complaint against the Inn alleged both negligence and a violation of the safe-place statute under WIS. STAT. § 101.11 (1999-2000).[1] At trial, the jury found that the Inn was negligent in failing to construct or maintain its premises as safely as the nature of the business would reasonably permit, but that its negligence was not a cause of Brown's accident. The jury further found that Brown was negligent, and that his negligence was a cause of his accident.

¶3 The issue on appeal is whether the trial court erroneously exercised its discretion when it permitted the Inn to present testimony as to the lack of prior accidents at the Inn. Before trial, Brown filed a motion in limine asking the trial court to prohibit the Inn from eliciting any testimony designed to inform the jury that there had been no prior similar incidents of guests attempting to enter the Inn via the swimming pool area or falling into the pool. The trial court denied the motion.

¶4 At trial, Shirley Hinds testified that she was the innkeeper at the Inn at the time of Brown's accident, and that she resided at the Inn from 1994 to 2000.

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

She testified that to her knowledge, no one had ever attempted to gain access to the Inn by walking through the pool area where Brown was injured. While acknowledging that she did not become an employee of the Inn until 1994, she testified that she had never received a complaint about the entrances to the Inn and "never had anyone have this kind of an accident."

¶5 Brown argues that the trial court's decision to admit this "negative evidence" must be reversed because the trial court failed to set forth reasons to support its decision, and because the prejudicial nature of the evidence outweighed its probative value. We review a trial court's decision admitting or excluding evidence under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The trial court has broad discretion, and our review is highly deferential. ***Id.*** at ¶¶28-29. When reviewing evidentiary issues, the question is not whether this court agrees with the trial court's ruling, but whether the trial court exercised discretion in accordance with accepted legal standards and the facts of record. ***State v. Mainiero***, 189 Wis. 2d 80, 94-95, 525 N.W.2d 304 (Ct. App. 1994). However, if the trial court fails to set forth the reasons for its ruling, this court will independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. ***Martindale***, 2001 WI 113 at ¶29; ***Mainiero***, 189 Wis. 2d at 95. We will uphold the trial court's decision if the record contains facts which would support the decision had the court fully exercised its discretion. ***Mainiero***, 189 Wis. 2d at 95-96.

¶6 Although the trial court did not engage in a reasoning process on the record when it denied Brown's motion in limine, we uphold its decision. Trial courts have discretion to admit or exclude "negative evidence" as to the lack of prior claims or accidents. ***Hannebaum v. DiRenzo & Bomier***, 162 Wis. 2d 488,

498-99, 469 N.W.2d 900 (Ct. App. 1991). Although the Wisconsin Supreme Court has characterized this kind of negative evidence in safe-place cases as only slightly probative, ***id.*** at 499, it remains within the trial court's discretion to determine whether it is probative in a particular case, and whether its relevance is outweighed by its prejudicial nature. ***Douglas v. Dewey***, 154 Wis. 2d 451, 468-69, 453 N.W.2d 500 (Ct. App. 1990).

¶7 Underlying Brown's claims of negligence and a violation of the safe-place statute were contentions that the exterior of the Inn was inadequately lighted, the entrance to the Inn was inadequately designed or marked, and the gate to the pool should have been locked or a warning given as to the existence of the pool. Brown's counsel extensively cross-examined Hinds on these issues, contending that the Inn should have known that the premises were unsafe and taken steps to make them safer. Under these circumstances, the trial court could reasonably determine that evidence regarding the lack of prior complaints or accidents was relevant to refute Brown's claims, and that its relevance was not outweighed by the danger of unfair prejudice. *See* ***id.***

¶8 In affirming the trial court's judgment, we have considered Brown's contention that Hinds' testimony lacked probative value because she was not employed at the Inn before 1994, and because her personal knowledge as to whether other guests had ever been confused as to the entrance or injured was limited. However, Hinds did not claim that she could personally vouch that no accident similar to Brown's had ever occurred at the Inn, or that no guest had ever gotten confused as to the entrance. She simply testified that no one had complained to her about the entrance or lighting, that she had never been informed of anyone having a problem, and that to her knowledge no one had ever been injured attempting to enter the Inn through the pool area. While she testified that

she lived right down the street from the Inn before becoming an employee in 1994 and could "tell the [Inn's] whole story" because she had been involved with its preservation, she also conceded that her knowledge was limited, that she had not searched records to determine if any injuries had ever been reported, and that she did not have personal knowledge of every person who might have had trouble finding the entrance during the Inn's operation.

¶9 The limitations on the probative value of Hinds' testimony were brought out by Brown's counsel on cross-examination and in closing argument. However, while this was information that the jury could consider in determining the weight to accord Hinds' testimony, it did not render her testimony inadmissible or otherwise render the trial court's decision to admit "negative evidence" an erroneous exercise of discretion.[2]

By the Court.—Judgment affirmed.

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

[2] In his appellant's brief, Brown also contends that in opening and closing argument, counsel for the Inn stated that the evidence indicated that in thirteen years of operation, no one had ever been confused or injured like Brown. Brown contends that counsel's argument went beyond Hinds' testimony, which was limited to stating that she personally knew of no one who had been injured or confused as to the entrance.

Although Brown discusses the opening and closing argument in his appellant's brief, he does not argue that he is entitled to a new trial on the ground that counsel's argument was improper, nor did he seek such relief in the trial court when the argument was made. Instead, he responded in his own closing argument, contending that the argument of counsel for the Inn was not supported by the evidence. A party must make a timely objection to an argument in the trial court in order to preserve an objection for appeal. ***Miles v. Ace Van Lines & Movers, Inc.***, 72 Wis. 2d 538, 545, 241 N.W.2d 186 (1976).