COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2003

Cornelia G. Clark
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. 02-0641 Cir. Ct. No. 99-CV-972

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

RICK J. GUERARD AND JOSEPH WENTZ,

PLAINTIFFS-APPELLANTS,

AMERISURE INSURANCE COMPANIES,

INVOLUNTARY-PLAINTIFF,

V.

DAIMLER CHRYSLER MOTORS CORP. F/K/A CHRYSLER CORP.,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

CARDINAL CONTRACTING, INC., AND BENCYN, INC.,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Rick J. Guerard and Joseph Wentz appeal pro se from a judgment dismissing their personal injury claims against Daimler Chrysler Motors Corp. They challenge an evidentiary ruling, the sufficiency of the evidence to support the jury's finding that Chrysler was minimally or not negligent, and the inclusion of their employer, Cardinal Contracting Inc., on the verdicts. They also argue that Chrysler violated its duties under Wisconsin's safe-place statute, WIS. STAT. § 101.11 (2001-02),[1] and that an indemnification agreement between Chrysler and their employer eviscerated the employer's worker's compensation immunity. They ask this court to exercise its discretion under WIS. STAT. § 752.35 to grant a new trial in the interests of justice. Although the appellants failed to file timely motions after verdict and have potentially waived all issues, we decline to enforce the waiver rule. We reject the claims of error and affirm the judgment.

¶2 Beginning in late 1996 and into 1997, Guerard and Wentz, union ironworkers for Cardinal Contracting, were performing work in Chrysler's Kenosha engine plant and were exposed to fumes from a nearby coolant filtration pit. On February 4, 1997, Guerard fell into the pit and never returned to work. They commenced this action alleging that Chrysler was negligent and had violated the safe-place statute in not protecting them from exposure to the coolant fumes.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Guerard sought to recover for injuries sustained in his fall; he claimed he fell while experiencing a coughing spell precipitated by the fumes. Wentz sought to recover for a pulmonary injury allegedly caused by exposure to the fumes. With respect to Guerard, the jury apportioned negligence 5% to Chrysler, 70% to Cardinal Contracting, and 25% to Guerard. The jury found no negligence by any party with respect to Wentz's claim.

¶3 Twenty-five days after the verdicts, Guerard filed a pro se letter requesting review of the case for issuance of a judgment notwithstanding the verdict or a mistrial. WISCONSIN STAT. § 805.16(1) requires all motions after verdict to be filed within twenty days. Chrysler argues that the appellants waived all the issues raised on appeal because no timely motions after verdict were filed. "[I]ssues intended to have been raised on motions after verdict may not be asserted as of right in support of the appeal" if motions after verdict are not timely. ***Hartford Ins. Co. v. Wales***, 138 Wis. 2d 508, 511, 406 N.W.2d 426 (1987). The waiver rule comports with the long-recognized premise that "generally no error of the trial court is reviewable as a matter of right on appeal without having given the trial court an opportunity to be apprised of and correct the error and order a new trial if necessary based on such error." ***Herkert v. Stauber***, 106 Wis. 2d 545, 560, 317 N.W.2d 834 (1982). However, despite the untimely motion in the trial court, this court may exercise its discretion to consider the issues raised by the appellants if we find that the interests of justice so require. ***Hartford Ins.***, 138 Wis. 2d at 522.

¶4 We decline to apply the waiver rule in this instance. First, Chrysler uses too broad a brush in depicting that all the appellate issues are waived. The evidentiary exclusion and form of the verdicts are issues that the trial court addressed and should be reviewed on appeal. Further, justice is better served by

addressing the issues rather than enforcing an unknowing forfeiture of appellate rights. We exercise our discretion to review the issues raised on appeal.

¶5 The appellants first argue that an OSHA report entitled, "Health Hazard Evaluation: Hypersensitivity Pneumonitis, Chrysler Kenosha Engine Plant, Kenosha, Wisconsin,"[2] should have been admitted into evidence. They characterize the report as demonstrating previous and known health problems associated with the coolant chemicals utilized at the Chrysler plant and Chrysler's participation in the study. They contend the report would have served as evidence that Chrysler had notice of the hazard or danger, an element of a safe-place violation.

¶6 Evidentiary rulings are committed to the trial court's discretion. ***Erbstoeszer v. Am. Cas. Co.***, 169 Wis. 2d 637, 644, 486 N.W.2d 549 (Ct. App. 1992). The question on appeal is whether the trial court exercised its discretion in accordance with the facts of record and accepted legal standards. ***Id.*** We will not find an error in the exercise of discretion if there is a reasonable basis for the trial court's determination. ***Id.***

¶7 The admissibility of the report arose during the testimony of John DeRosia, a mechanical engineer who opined that Chrysler was negligent in permitting the appellants' exposure to the coolant fumes. DeRosia testified that he had reviewed the OSHA report in formulating his opinion. Although DeRosia referred to the report as putting Chrysler on notice of potential problems with

[2] The fact sheet of the report indicates that it was issued in April 1997 as part of an OSHA Consultation Program. The report was prepared by the Wisconsin Department of Health and Family Services, Division of Health, Bureau of Public Health, Section of Occupational Health.

exposure to machine coolants, he did not testify about the substance of the report. DeRosia's initial testimony did not render the report itself admissible. Matters upon which an expert relies in formulating an opinion may be disclosed to the jury as a basis for the opinion, but those matters are not received as substantive evidence. *See* ***Heyden v. Safeco Title Ins. Co.***, 175 Wis. 2d 508, 522, 498 N.W.2d 905 (Ct. App. 1993), *overruled on other grounds by* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 382, 541 N.W.2d 753 (1995).

¶8 On cross-examination, DeRosia was asked if he knew what Chrysler did to monitor the use of the fluids in the plant. He responded that monitoring was done in conjunction with production of the OSHA report and that the data collection had extended into 1996, the same year the appellants started working in the plant. On further examination, DeRosia acknowledged that the data was collected from a different part of the plant than where the appellants worked. Then Chrysler asked whether OSHA's 1996 investigation had revealed any violations with respect to the handling of metal working fluids. DeRosia responded that in the areas inspected, OSHA found that Chrysler employees were adequately protected through the use of personal protective equipment.

¶9 Upon further examination, the appellants had DeRosia identify the report. DeRosia testified that the fluid used at the Chrysler plant had caused many cases of occupational bronchitis as well as hypersensitivity pneumonitis as documented by the appellants and the OSHA study. On recross, Chrysler questioned whether the OSHA report dealt specifically with hypersensitivity pneumonitis, a condition neither appellant suffers. Chrysler also asked whether the OSHA study had been conducted in a different area of the plant with workers with a different level of exposure than that experienced by the appellants. DeRosia agreed that all those contentions were true.

¶10 The admissibility of the OSHA report was ultimately determined when the appellants attempted to have DeRosia identify statistical information from the report about the reported cases from a pool of seventy-one employees of hypersensitivity pneumonitis, occupational asthma, asthma, bronchitis or occupational bronchitis, and other diagnoses. The appellants argued that Chrysler's examination had opened the door to admission of the OSHA report. Chrysler argued that the report was not relevant because it was limited to hypersensitivity pneumonitis and involved exposure in a different part of the plant, at a different period of time, and by employees performing different work.

¶11 The trial court noted that the report analyzed the development of symptoms from October to December 1995 in employees who worked in a part of the plant different from where the appellants worked. It found that the OSHA report was limited to the occurrence of hypersensitivity pneumonitis, a condition neither appellant suffers. It specifically found that since the report was so limited, the information about other diagnoses was not probative of any fact, and even if probative, the substantial prejudice created by admission of the report outweighed any probative value.

¶12 We conclude that the trial court properly exercised its discretion in excluding the OSHA report. It has long been recognized that "[r]elevancy is not determined by resemblance to, but by the connection with, other facts." ***Oseman v. State***, 32 Wis. 2d 523, 526, 145 N.W.2d 766 (1966). While we recognize that the OSHA report demonstrates that exposure to metal working chemicals can create respiratory problems, all that can be said is that the symptoms experienced by some Chrysler employees (who were not the focus of the report) resembled symptoms the appellants experienced. The focus of the study had no connection to the exposure experienced by the appellants. Not only did the appellants work in

a different location within the Chrysler plant than that studied,[3] but they performed different duties, had a different exposure experience, and worked at a different time. These differences served to sever the connection between the report and the appellants' circumstances. *See* ***Krueger v. Tappan Co.***, 104 Wis. 2d 199, 209, 311 N.W.2d 219 (Ct. App. 1981) ("While remoteness in point of time does not necessarily render evidence irrelevant, it may do so where the elapsed time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof."). Also the appellants were not even Chrysler employees but the employees of another entity. Since the report had little probative value, the trial court's determination that potential prejudice outweighed the probative value was not an erroneous exercise of discretion. We affirm the refusal to admit the report.

¶13 The appellants next argue that Chrysler was improperly allowed to delegate its safe-place duties to Cardinal Contracting. They complain that throughout the trial Chrysler was allowed to place blame on Cardinal Contracting knowing that Cardinal Contracting enjoyed worker's compensation immunity from liability. Their argument essentially attacks the inclusion of Cardinal Contracting in the negligence apportionment question of the verdicts and the failure to instruct the jury about the indemnification agreement between Chrysler and Cardinal Contracting.

[3] The location of work is significant. The executive summary portion of the report summarized that "all hypersensitivity pneumonitis cases who developed symptoms from October to December 1995 worked in a central area of the plant" and that a majority of those cases worked in proximity to "systems 3 and 4," which were subject to heavy bacterial and fungal contamination three to six months before symptoms developed.

¶14 At trial the appellants objected to the inclusion of Cardinal Contracting and themselves in the negligence apportionment questions. They argued there was no evidence that Cardinal Contracting was negligent because it relied on Chrysler's assurances that the coolant fumes would cause no harm and Cardinal Contracting had no ability to control the work environment.

¶15 The rule is that "the negligence of all joint tortfeasors must be apportioned according to their degree of negligence." ***Payne v. Bilco Co.***, 54 Wis. 2d 424, 431, 195 N.W.2d 641 (1972). The comparison must be made regardless of the source of the duty supporting negligence. ***Id.*** at 432. Thus, even though immune under worker's compensation, the question of the employer's negligence should be included on the verdict for comparative negligence. ***Connar v. W. Shore Equip.***, 68 Wis. 2d 42, 45, 227 N.W.2d 660 (1975); ***Haase v. R&P Indus. Chimney Repair Co.***, 140 Wis. 2d 187, 191 n.1, 409 N.W.2d 423 (Ct. App. 1987). "If there is evidence of conduct that, if believed by the jury, would constitute negligence on the part of an actor, then that actor should be included in the special verdict." ***York v. Nat'l Cont'l Ins. Co.***, 158 Wis. 2d 486, 494, 463 N.W.2d 364 (Ct. App. 1990).

¶16 The trial court found that there was evidence from which the jury could find that Cardinal Contracting was negligent with respect to its duty to provide a safe workplace or to restrict or remove its employees from areas where it was reported that the coolant fumes were offensive. We independently review the record to determine if there was evidence that would justify including Cardinal Contracting in the comparative negligence inquiry. *See* ***Hannebaum v. DiRenzo & Bomier***, 162 Wis. 2d 488, 501 n.4, 469 N.W.2d 900 (Ct. App. 1991) (the question of whether sufficient credible facts warrant sending the particular

question to the jury is a question of law that we review without deference to the trial court's determination).

¶17 We conclude there was sufficient evidence. DeRosia indicated that Cardinal Contracting had a responsibility for the safety of the appellants. He acknowledged that Guerard complained to his employer and the response was to repeat assurances from Chrysler that the materials were noninjurious and to hand out dust masks as ventilators. He opined that Cardinal Contracting had not fulfilled its obligation to protect the safety of its employees. There was also the suggestion through DeRosia's testimony that Cardinal Contracting should have asked what the chemical was and possibly requested and reviewed the relevant material safety data sheet. A Chrysler representative explained that Cardinal Contracting acknowledged receipt of the contractor's booklet, "Safety and Health Requirements for Contractors," provided by Chrysler to all contractors working within the plant. The booklet states that it is the responsibility of the contractor to provide, maintain, inspect and ensure that all necessary equipment, including personal protective equipment, is properly utilized or worn during the job. This evidence was sufficient to raise a jury question about possible negligence by Cardinal Contracting.

¶18 We understand the appellants to argue that under ***Barry v. Employers Mutual Casualty Co.***, 2001 WI 101, 245 Wis. 2d 560, 630 N.W.2d 517, Cardinal Contracting's negligence should have been imputed to Chrysler because Chrysler had a nondelegable duty under the safe-place statute. In ***Barry***, the plaintiff's fall was caused by a loose nosing on a stair tread, a condition determined to be an "unsafe condition associated with the structure." ***Id.***, ¶30. The building's owner, Ameritech, brought a third-party complaint against a general contractor and its subcontractor that had performed work on the defective

stairway. The jury apportioned negligence 45% to Ameritech for a breach of the safe-place statute, 45% to the contractors who had installed the nosing, and 10% to Barry. The court concluded that the apportionment of negligence to the contractors was relevant only to Ameritech's claim for contribution and that any negligence attributed to the repairing contractors had to be imputed to Ameritech because its duties under the safe-place statute were nondelegable. ***Id.***, ¶44.

¶19 The principles illustrated by ***Barry*** have no application here. In ***Barry*** the contractors did not have safe-place duties to the plaintiff; they had been hired to fulfill the owner's safe-place duties by installation of the nosing. In contrast, Cardinal Contracting was not hired to fulfill Chrysler's safe-place duties but had its own safe-place duties to the appellants as their employer. The safe-place duties of each were independent of the other and different in scope. *See* ***Naaj v. Aetna Ins. Co.***, 218 Wis. 2d 121, 126, 579 N.W.2d 815 (Ct. App. 1998) (obligation of an owner of a public building to furnish a safe place under the safe-place statute is limited to structural or physical defects or hazards whereas the obligation of an employer to furnish a safe place of employment is a broader duty which includes providing both a safe place of employment and safe employment). There was no basis to impute Cardinal Contracting's negligence to Chrysler. The form of the verdicts was proper.

¶20 The appellants also argue that the jury instructions were misleading and essentially allowed Chrysler to delegate its safe-place duties to Cardinal Contracting. The trial court has wide discretion in issuing jury instructions. ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). "If the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist." ***Id.*** at 850.

¶21 Here standard instructions were used to inform the jury about the law of contributory negligence, Cardinal Contracting's duties as an employer under the safe-place statute, Chrysler's duty under the safe-place statute to construct, repair, and maintain the premises so as to make them safe, and comparative negligence.[4] WIS JI—CIVIL 1007, 1900.2, 1900.4. The instructions did not, as the appellants contend, have the effect of putting Cardinal Contracting at fault or virtually releasing Chrysler. The instructions stated the applicable law and left the jury to determine negligence.

¶22 The appellants contend that the jury should have been instructed on the effect of the indemnity agreement between Chrysler and Cardinal Contracting. However, the indemnity agreement had no relevance to the question of comparative negligence. "Whether that owner or employer is to be made financially whole from another source by principles of law or contract is an entirely different question." ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis. 2d 120, 132, 301 N.W.2d 201 (1981). The jury did not need to know that if Chrysler was made to pay damages, Cardinal Contracting (or its insurer) would really be paying. Likewise, the jury was not to be influenced by information that Cardinal Contracting enjoyed worker's compensation immunity and would not be ordered

[4] The appellants suggest that the following nonstandard instruction delegates liability from Chrysler to Cardinal Contracting:

> A building owner who sublets all or a part of a contract to a contractor has a duty not to commit an affirmative act which would increase the risk of injury to an employee of the contractor. An affirmative act is an act of commission—that is, something that one does—as opposed to an act of omission, which is something one fails to do.

The instruction does not misstate the law.

to pay damages for the jury's apportionment of negligence to Cardinal Contracting. "[I]t is usually reversible error to inform the jury, either directly or impliedly, of the ultimate effects of its answer. The purpose of this rule is to insure that juries make their decisions based upon the evidence in front of them, and not upon sympathies or concerns for the parties involved in the action." ***Estate of Burgess v. Peterson***, 196 Wis. 2d 55, 71, 537 N.W.2d 115 (Ct. App. 1995), *overruled on other grounds by* ***Stoppleworth v. Refuse Hideaway, Inc.***, 200 Wis. 2d 512, 524 n.11, 546 N.W.2d 870 (1996).

¶23 We summarily reject the appellants' contention that Cardinal Contracting lost its worker's compensation immunity by virtue of the indemnification agreement with Chrysler and therefore, Cardinal Contracting should be made to pay damages. The indemnification agreement does not trump the laws of this state affording Cardinal Contracting worker's compensation immunity. Further, no action was commenced by the appellants against Cardinal Contracting and at no time did Cardinal Contracting waive its worker's compensation exclusivity defense. Cardinal Contracting only agreed to indemnify Chrysler for liability Chrysler might incur as a result of Cardinal Contracting's work at the plant. The indemnification agreement did not come into play with respect to Cardinal Contracting's liability to its own employees.[5]

[5] The appellants' citation to ***Barrons v. J. H. Findorff & Sons, Inc.***, 89 Wis. 2d 444, 455, 278 N.W.2d 827 (1979) ("when an action is based upon a safe-place statute duty the indemnitor will be required to indemnify the indemnitee to the extent of the indemnitor's share of the total liability, creating an effect identical to that of contribution"), is misplaced. The indemnification situation ***Barrons*** speaks to is not present here because Chrysler was not found liable for damages.

¶24 The appellants argue that there is no credible evidence to support the jury's verdicts that Chrysler was minimally or not negligent. When reviewing whether there is sufficient evidence to sustain a jury verdict, we must review the evidence in a light most favorable to the verdict. ***Nieuwendorp v. Am. Family Ins. Co.***, 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995). We will sustain a jury's award if there is any credible evidence that supports the verdict. ***Id.*** When more than one inference may be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury. ***Id.*** This standard is even more appropriate when the jury's verdict has the approval of the circuit court. ***Id.***

¶25 The appellants do not provide a discussion of the evidence and raise nothing more than a disagreement with the jury's assessment of the evidence. The evidence permitted competing inferences. We cannot disregard the inferences drawn by the jury. Although Guerard testified that a coughing spell precipitated by exposure to the coolant fumes caused him to fall from the ladder, the jury was free to reject that testimony. We conclude there was sufficient credible evidence to support the verdicts.

¶26 Arguing for a new trial in the interests of justice, the appellants complain about the performance of their trial counsel. They contend counsel refused to call certain witnesses, failed to seek a change of venue when it became apparent that every juror had a friend or relative working for Chrysler, and failed

to resist the removal of a juror with firsthand knowledge.[6] We will not review these contentions. The appellants' remedy is to pursue a malpractice action against the allegedly incompetent attorney. ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 406, 308 N.W.2d 887 (Ct. App. 1981). This case does not meet the strict standard for a discretionary reversal occasioned by an "egregious example of incompetent counsel." ***Id.*** at 407.

¶27 Finally, we reject the appellants' contention that a new trial is warranted in the interests of justice because the real controversy was not fully tried. WIS. STAT. § 752.35. We have already concluded that there was no error in the exclusion of the OSHA report or the jury instructions. The appellants have not raised any additional allegations other than the issues previously discussed. There are no grounds to conclude that the real controversy was not fully tried. ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 118, 352 N.W.2d 223 (Ct. App. 1984) (zero plus zero equals zero). Additionally, we do not reverse because of a miscarriage of justice because we are not persuaded of the existence of a substantial probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

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[6] The appellants also suggest that the trial court erred by putting its calendar ahead of justice in refusing to grant an adjournment one week before trial so they could discharge counsel and retain new counsel. The issue, if one is intended, is inadequately briefed. We need not consider arguments broadly stated but not specifically argued. ***Fritz v. McGrath***, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988). Rulings on motions for continuance are discretionary decisions for the trial court. ***T & HW Enters. v. Kenosha Assocs.***, 206 Wis. 2d 591, 599, 557 N.W.2d 480 (Ct. App. 1996). The trial court noted that the request for an adjournment was just one week before trial, that one week had been set aside for the trial, that the case had been pending for two years, that the case was number one on the trial calendar, and that trial counsel was first learning of the request at the hearing. The trial court properly exercised its discretion in denying what it considered to be a request for adjournment beyond the eleventh hour. *See* ***id.*** at 601.

By the Court.—Judgment affirmed.

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