COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP304 **Cir. Ct. No. 2006CV1517**

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

MAUREEN MELLOM,

PLAINTIFF-RESPONDENT,

V.

SCHINDLER ELEVATOR CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This is a strict products liability case. Douglas Mellom was performing a service call on a freight elevator at General Motors' (GM) Janesville plant when he fell from the unguarded top of the elevator car to his death. The elevator was installed by Schindler Elevator Corporation.

Douglas's wife, Maureen Mellom (Mellom), sued Schindler and other defendants, alleging that the elevator was defective and unreasonably dangerous because the top of the elevator did not have a guardrail and its absence was a substantial factor in causing Douglas's fall. The case was tried to a jury. The jury returned a verdict in favor of Mellom and against Schindler and one other defendant, awarding damages to Mellom.

¶2 Schindler contends the trial court erred in denying its motion to dismiss, which alleged that GM had substantially and materially changed the design and function of the elevator, that the accident was the result of misuse of the elevator, and that the evidence established as a matter of law that the fall hazard on the elevator was an open and obvious danger. Schindler also argues the evidence was insufficient as a matter law to support the jury's findings that GM's negligence was not a substantial factor in causing Douglas's death, that Douglas was not contributorily negligent in causing his own fall, and that Otis Elevator was not causally negligent. Finally, Schindler maintains the trial court erred in admitting into evidence and allowing Mellom to use for improper purposes at trial a citation the United States Occupational, Safety, and Health Administration (OSHA) issued to GM alleging it violated OSHA workplace regulations in maintaining the elevator top without a guardrail.

¶3 We conclude the trial court properly denied Schindler's motions to dismiss, and there was credible evidence that the fall hazard on top of the elevator did not constitute an open and obvious danger. We further conclude there was sufficient evidence to support the jury's findings that GM's negligence was not causal, Douglas was not contributorily negligent, and Otis Elevator was not negligent. Assuming the trial court erred in admitting evidence of the OSHA

citation and in allowing Mellom to misuse this evidence, we conclude these errors were harmless. Accordingly, we affirm.

I. BACKGROUND

¶4 Schindler manufactures, installs and services elevators. In 1998, Schindler installed a freight elevator in the GM plant in Janesville. The elevator was designed by Minnesota Elevator, Inc. As designed and installed, the elevator did not include a guardrail on the top of the elevator car, a site from which elevator mechanics routinely perform maintenance work. At the time, neither the national Elevator Safety Code nor the state Elevator Safety Code, WIS. ADMIN. CODE § Com 18.1 (1998), required the tops of elevators to be equipped with guardrails. Schindler employees testified at trial that they were aware that the unguarded elevator top presented a fall hazard to GM millwrights[1] performing maintenance tasks on top of the elevator. A thirty-six inch gap existed between the perimeter of the elevator car and the wall of the elevator shaft, or "hoistway."

¶5 As installed, the elevator included a hatch in the back left corner of the top of the elevator that opened from the outside of the elevator only. GM later modified the hatch so that it opened from the inside of the elevator and installed a ladder that went up to the hatch. This modification allowed GM millwrights to access the top of the elevator via the ladder by climbing onto the elevator top through the hatch. Because the hatch was located in the left rear corner of the

[1] A "millwright" is a "work[er] who erects the shafting, moves machinery, and cares for the mechanical equipment in a workshop, mill, or plant." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1435 (1993).

elevator, persons emerging from the hatch were in close proximity to the fall hazard at the elevator's edge.

¶6 The top of the elevator could also be accessed by use of a built-in service door. The elevator car would be sent to a lower floor and stopped manually when the top of the elevator was flush with the bottom of the service door, allowing the millwright to access the top of the elevator through the service door. According to Schindler, this was the only proper method by which millwrights and elevator mechanics should access the elevator top.

¶7 Douglas was employed as a millwright at the Janesville GM plant. On October 30, 2003, Douglas and another millwright, Cesar Cisneros, were assigned to the unit responsible for servicing equipment breakdowns in the paint department. That day, Douglas and Cisneros responded to a call that an elevator was down and discovered that the door gate of the elevator was off track. The two men were unsuccessful in getting the gate back on track. It was determined that it would be necessary to get on top of the elevator to realign the elevator gate. Shortly thereafter, Douglas accessed the elevator top by climbing the elevator ladder and opening the hatch.

¶8 Cisneros called up to Douglas and offered to bring a flashlight up to him. Douglas responded that he did not need a flashlight and that he was coming down. Cisneros told Douglas he would climb up through the hatch and shine the flashlight along the top of the elevator to help Douglas find his way back to the hatch. Douglas responded, "Okay." Moments later, Douglas fell to his death. Neither Cisneros nor his supervisor, Mike Danielson, who was also present by this time, saw or heard the fall, and neither saw any part of Douglas's person around

the hatch before the fall. Cisneros later discovered Douglas's body on the floor of the elevator shaft in the corner directly below the elevator hatch.

¶9 OSHA investigated Douglas's death, and issued a citation to GM, charging it with maintaining a raised work platform that was not guarded by standard guardrails, contrary to 29 C.F.R. 1910.23(c)(1).

¶10 Maureen Mellom sought damages for Douglas's death in a product liability suit against Schindler and Minnesota Elevator, among other defendants.[2] Mellom alleged that the elevator as designed and installed in the Janesville plant was defective and unreasonably dangerous because the elevator top did not have guardrails.

¶11 The case was tried to a jury, with Schindler and Minnesota Elevator as the only remaining defendants. Schindler filed a motion *in limine* to exclude evidence of GM's OSHA citation, which the trial court denied. Schindler and Minnesota Elevator made motions to dismiss at the end of Mellom's case and at the close of all evidence, which the trial court also denied. The case was submitted to the jury, which found that the elevator was defective as designed and provided by Minnesota Elevator and Schindler. Among the jury's other findings were that GM was negligent, but that its negligence was not a cause of Douglas's death; Douglas was not negligent with respect to his own care and safety; and Otis Elevator, a non-party, was not negligent. The jury assigned sole responsibility for

[2] Mellom also sued Angus Young Associates, Inc., which provided architectural design services to GM in the installation of the elevator; James R. Bertling and National Elevator Inspection Services, Inc., who conducted annual inspections of the elevator; and John S. Eagon, PE, d/b/a Premium Plainview, who reviewed the elevator design plans. Mellom settled with Angus Young, Bertling and National Elevator prior to trial. Eagon was dismissed from the suit on summary judgment.

Douglas's death to Minnesota Elevator and Schindler, finding each party 50% responsible.

¶12 Minnesota Elevator settled with Mellom prior to the entry of judgment, and is not a party to this appeal. Schindler filed a motion to set aside the jury's verdict, which the trial court denied. Schindler appeals. Additional facts are presented as necessary in the discussion section.

II. DISCUSSION

¶13 As we noted, Schindler presents three primary contentions. We organize our discussion of these contentions in the following manner. We first discuss Schindler's contentions regarding the denial of its motions to dismiss. We next consider Schindler's contention that the trial court erred by not setting aside the jury's verdict on the grounds that GM was causally negligent, Douglas was contributorily negligent, and Otis Elevator was causally negligent. We then discuss whether evidence of the OSHA citation issued to GM should have been admitted and whether Mellom misused that evidence at trial.

A. Motions to Dismiss

¶14 Schindler contends the trial court erred in denying its motions to dismiss at the close of Mellom's case and at the close of evidence because Mellom failed to prove: (1) that GM's modification of the hatch on the top of the elevator and its addition of a ladder inside the elevator was not a substantial and material change to the elevator's design and function and, thus, Schindler was relieved of liability under ***Glassey v. Continental Ins. Co.***, 176 Wis. 2d 587, 600, 500 N.W.2d 295 (1993); and (2) that Douglas's misuse of the hatch as a service access to the elevator top was not a factor in his death. We reject both contentions.

¶15 A court may not grant a motion to dismiss for insufficient evidence unless it is satisfied that, "considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). A court may grant a motion to dismiss at the close of a plaintiff's case only if "it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom," and that there is no credible evidence to support the plaintiff's case. ***Id.*** (citations omitted).

¶16 We give substantial deference to a trial court's decision whether to grant a motion to dismiss at the end of a plaintiff's case or at the end of all the evidence because the trial court is best situated to assess the evidence and to decide the appropriate weight and relevancy to give to the evidence. ***Id.*** at 388-89. We will not reverse a trial court's decision to dismiss a case for insufficient evidence unless the record shows that the trial court was "clearly wrong." ***Id.*** at 389 (citation omitted).

1. Substantial and Material Change

¶17 Wisconsin courts impose strict liability on sellers or manufacturers of products when certain conditions are met. *See* ***Dippel v. Sciano***, 37 Wis. 2d 443, 459, 155 N.W.2d 55 (1967) (adopting RESTATEMENT (SECOND) OF TORTS 402A (1965)). A claim for strict products liability requires proof of each of the following five elements:

> (1) that the product was in a defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages, (4) that the seller engaged in

> the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and (5) that the product was one which the seller expected to and did reach the user or consumer *without substantial change* in the condition it was when he sold it.

Glassey, 176 Wis. 2d at 599 (citation omitted). We focus here on the fifth element concerning substantial change to the product. A substantial change to the condition of the product means a substantial change that is material to the accident after the product leaves the manufacturer's or seller's control. *See* ***id.*** at 599-600. "Once the plaintiff has met its burden of proof, the manufacturer … is deemed negligent *per se*," subject to the defense of contributory negligence. ***Id.*** at 599.

¶18 It is undisputed that GM modified the elevator hatch by adding a hinge and a ladder to allow millwrights to access the elevator top through the elevator car. Prior to GM's modification, the hatch did not open from the inside of the elevator. Schindler argues that Mellom failed to prove that this modification was not a substantial change. Schindler further argues Mellom failed to prove that the substantial change to the elevator was not materially linked to the accident and asserts that the only reasonable inference supported by the evidence is that Douglas fell to his death while attempting to reenter the elevator car through the modified hatch. Without this substantial and material change to the elevator, argues Schindler, Douglas would have accessed and exited the elevator top using the service door, and would never have been near the fall hazard where the hatch was located.

¶19 The problem with this argument is that Schindler ignores other evidence in the record that supports the inference that the hatch had nothing to do with Douglas's fall. We conclude, viewing the evidence in the light most

favorable to the verdict, that the modifications were not material to Douglas's accident.

¶20 The evidence adduced at trial supports two competing inferences as to what caused Douglas to fall. On the one hand, the evidence supports a reasonable inference that Douglas fell while attempting to reenter the elevator car through the modified hatch. His body was discovered on the floor of the elevator shaft in the corner directly below the elevator hatch. On the other hand, a reasonable jury could infer from the evidence that Douglas's fall occurred because he was not protected by guardrails. In other words, even if Douglas had been attempting to use the hatch at the time of the fall, a jury could still reasonably conclude that the fall was caused by the absence of guardrails, not the modifications to the hatch. The jury was entitled to adopt either inference, and we are required to accept the inference the jury adopts. *See* ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2009 WI 74, ¶38, 319 Wis. 2d 1, 768 N.W.2d 615 (citation omitted) ("Where more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the one reached by the fact finder."). The jury apparently chose to believe that Douglas fell because the top of the elevator did not have guardrails and that his fall had nothing to do with his use of the hatch.

¶21 Ample evidence was presented to support the inference that Douglas's fall was caused by the lack of guardrails and not because the hatch was modified. Dr. Ralph Barnett, Mellom's safety expert, testified that the changes to the hatch were not a substantial factor in causing Douglas's death. Rather, according to the safety expert, the absence of guardrails on top of the elevator was the sole factor in causing Douglas's fall. The safety expert opined that Douglas would not have fallen had the guardrails been installed, regardless whether

Douglas was attempting to exit the top of the elevator through the modified hatch. Indeed, even Schindler's own elevator expert, Patrick Carajat, agreed that Douglas probably would not have fallen had the guardrails been installed. We therefore conclude the trial court properly denied the motions to dismiss because sufficient evidence exists to establish that GM's modification to the hatch was not a substantial and material change to the elevator.

2. Misuse

¶22 A defense to a claim of strict product liability is that the product was not being "reasonably used for the purpose for which it was intended." ***Dippel***, 37 Wis. 2d at 443; *see also* WIS JI—CIVIL 3260 (manufacturer of an unreasonably dangerous product "is regarded by law as responsible for harm caused by the product … provided the product was being used for the purpose for which it was designed and intended to be used.").

¶23 Schindler argues the trial court erred in denying its motions to dismiss because the evidence at trial demonstrated that Douglas, by using the modified hatch to access and exit the elevator top, did not use the elevator in a manner for which it was designed to be used. According to Schindler, the hatch was designed only as an emergency exit for trapped elevator passengers and Douglas (and other millwrights) misused the hatch as an access door to the elevator top when servicing the elevator. In response, Mellom argues that there was no evidence of misuse by Douglas. According to Mellom, Douglas's use of the hatch was consistent with the way that others regularly used the hatch to access the top of the elevator, such as inspectors, elevator mechanics and employees of Schindler. And even if misuse occurred, argues Mellom, it was foreseeable, and

Schindler had a duty to warn about any foreseeable misuse under WIS JI—CIVIL 3262,[3] an instruction which was given to the jury in this case.

¶24 We need not address the parties' dispute about the modification to the hatch and whether such use was foreseeable. As we have explained, the jury could have reasonably determined on the credible evidence that Douglas's fall was not linked to the hatch. Again, the jury could have reasonably concluded that Douglas's fall did not occur as a result of his attempted use of the hatch, and that the absence of guardrails was the sole cause of the accident. Accordingly, we conclude the trial court properly denied the motions to dismiss because sufficient evidence exists to establish that alleged misuse of the elevator hatch was not a cause of the accident.

B. Special Verdict Questions

¶25 After trial, Schindler filed motions seeking an order from the trial court setting aside the jury's answers to four questions on the special verdict form: (1) verdict question no. 3, relating to the defective and unreasonably dangerous condition of the elevator; (2) verdict question no. 8, finding GM's negligence was not a substantial factor in causing Douglas's death; (3) verdict question no. 11, finding Douglas was not contributorily negligent; and (4) verdict question no. 9, relating to whether Otis Elevator was negligent with respect to servicing the elevator. Schindler argues the trial court erred by not setting aside the jury's answers to these verdict questions because the evidence was insufficient as a

[3] WISCONSIN JI—CIVIL 3262 provides as pertinent: "a manufacturer (supplier) has the duty to warn of dangers inherent in a use not intended by the manufacturer (supplier), if such unintended use was reasonably foreseeable by the manufacturer (supplier)."

matter of law to support the jury's findings. We address and reject each argument in turn.

¶26 When reviewing a trial court's decision to grant or deny a motion to set aside a jury's verdict for lack of sufficient evidence, we will affirm if there is any credible evidence, or any reasonable inferences drawn from that evidence, to support the verdict. *See* ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 784, 541 N.W.2d 203 (Ct. App. 1995). We view the evidence presented at trial in the light most favorable to the jury's verdict. ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶6, 245 Wis. 2d 772, 629 N.W.2d 727. "This is especially true where, as here, the verdict has the approval of the trial court." ***Thompson v. Village of Hales Corners***, 115 Wis. 2d 289, 314, 340 N.W.2d 704 (1983).

1. Special Verdict Question No. 3: Open and Obvious Danger

¶27 Schindler argues that the evidence adduced at trial established that, although the top of the elevator presented an obvious fall hazard, the hazard was not unreasonably dangerous because it was well recognized and fully appreciated by the elevator mechanics and millwrights such as Douglas. That is, Schindler argues that, applying the consumer-contemplation test articulated in ***Green***, 245 Wis. 2d 772, the only credible evidence adduced at trial on this issue established that the danger was open and obvious and therefore Schindler cannot be strictly liable for Douglas's accident. We are not persuaded.

¶28 A product is defective if, at the time it left the seller's possession, it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." ***Green***, 245 Wis. 2d 772, ¶77; ***Vincer v. Esther Williams All-Aluminum Swimming Pool Co.***, 69 Wis. 2d 326, 330-31, 230 N.W.2d 794 (1975) (adopting cmt. g to § 402A of RESTATEMENT (SECOND) OF

TORTS). Whether a product is defective is determined on a case-by-case basis, based on the expectations of the ultimate user or consumer. *See* ***Godoy v. E.I. du Pont de Nemours and Co.***, 2009 WI 78, ¶41, 319 Wis. 2d 91, 768 N.W.2d 674. "This is an objective test and is not dependent upon the knowledge of the particular injured consumer." ***Vincer***, 69 Wis. 2d at 332.

¶29 Mellom's complaint alleges a defect in the design of the elevator, namely, the absence of guardrails on the top of the elevator. "A product has a design defect when the design itself is the cause of the unreasonable danger." ***Godoy***, 319 Wis. 2d 91, ¶29. Here, the complaint alleges that the elevator was designed and installed without guardrails attached to the top, thereby creating an unreasonably dangerous risk of falling from the top of the elevator.

¶30 A product is "unreasonably dangerous" when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." ***Tanner v. Shoupe***, 228 Wis. 2d 357, 367, 596 N.W.2d 805 (Ct. App. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmts. g and i (1965)). "This standard requires manufacturers to anticipate what consumers will expect, and to take safety precautions in accordance with those expectations." ***Horst v. Deere & Co.***, 2009 WI 75, ¶28, 319 Wis. 2d 147, 769 N.W.2d 536. Safety precautions may include implementing reasonably available safety features. ***Id***.

¶31 As a general rule, a manufacturer is not liable for injuries caused by a defective product when the danger posed by the defect is open and obvious to the ordinary consumer. *See* ***Tanner***, 228 Wis. 2d at 367; ***Vincer***, 69 Wis. 2d at 330-31. Whether a condition is an open and obvious danger is typically a question

of fact for the jury to decide. ***Tanner***, 228 Wis. 2d at 367. We will uphold a jury's finding whether a condition is an open and obvious danger if any credible evidence exists to support the jury's verdict.

¶32 Schindler argues that the fall hazard that existed on the top of the elevator was an open and obvious danger and therefore Schindler is shielded from liability. We disagree.

¶33 In ***Sumnicht***, the supreme court identified five permissive factors a court may consider when determining whether a product is unreasonably dangerous. ***Sumnicht v. Toyota Motor Sales, U.S.A., Inc.***, 121 Wis. 2d 338, 372, 360 N.W.2d 2 (1984). In determining that the jury could have reasonably concluded that the elevator was unreasonably dangerous, we focus on two of these factors: "the ability of a manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive" and "the relative likelihood of injury resulting from the product's present design" ***Id.***

¶34 Turning to the first of these factors, ample evidence was presented that Schindler was aware at the time the elevator was designed and manufactured that: an unguarded elevator top created an obvious falling hazard; guardrails were available; guardrails would not impair the elevator's function, and that they were not unduly expensive. For example, Schindler's installation supervisor for the elevator, Andrew Zielke, testified guardrails were available and there was no practical reason they could not have been installed. Zielke testified that the cost of installing guardrails would have been relatively low compared to the total cost of the elevator. Schindler's design engineer for the elevator, Kevin Asselin, testified that he understood the fall hazard that the elevator posed without handrails, but guardrails were omitted from the design in order to save money. The evidence at

trial established that the cost of manufacturing and installing the elevator was approximately $250,000, and installing guardrails would have added no more than $2,000 to the total cost. Nonetheless, a Schindler employee directed Minnesota Elevator to delete guardrails from its blueprints for the elevator because guardrails were not required by the Wisconsin elevator code. In short, a jury could have reasonably concluded that Schindler was aware of the falling hazard, that safety measures could be taken to reduce or eliminate the hazard by installing guardrails at a minimal cost, but chose not to install the guardrails to save costs and because Wisconsin code did not require it.

¶35 Likewise, the trial record is replete with evidence demonstrating the relative likelihood of injury resulting from the product's present design. For example, one of Schindler's own experts, Patrick Carajat, testified that it was likely Douglas would not have fallen had the guardrails been in place. Moreover, witnesses involved in the design and installation of the elevator agreed that elevator shaft falls are a major cause of death in the elevator industry and that guardrails substantially reduce the risk of falls. As noted, Mellom's safety expert, Dr. Barnett, testified that the sole cause of Douglas's fall was the absence of guardrails on top of the elevator. In his view, although the fall hazard was objectively open and obvious, the fall risk that the absence of handrails posed to elevator mechanics and millwrights such as Douglas was too high and unreasonable.

¶36 Because the evidence discussed above supports the jury's verdict that the elevator was defective and unreasonably dangerous despite the millwrights' awareness of the hazards presented by the unguarded elevator top, we

conclude the trial court properly denied Schindler's motion for a directed verdict on this question.[4]

2. Verdict Question No. 8: General Motors' Negligence

¶37 The jury answered "yes" to the question of whether GM was negligent, and "no" to the question of whether GM's negligence was a cause of Douglas's death. Schindler challenges the jury's verdict that GM's negligence was not a cause of Douglas's death and argues that the only reasonable reference that could be drawn from the evidence is that GM's negligence was clearly a substantial factor in Douglas's death. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co., Inc.***, 84 Wis. 2d 455, 458, 267 N.W.2d 652 (1978) ("The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result.").

¶38 Schindler contends that, by modifying the hatch, GM created an unsafe means of accessing and exiting the elevator top. Schindler further maintains that the evidence showed that GM failed to create a safe place of employment for Douglas by: (1) installing an unsafe ladder up to the hatch without

[4] Schindler acknowledges that the question of whether a condition is an open and obvious danger is typically a question of fact for the jury to determine. *See* ***Tanner v. Shoupe***, 228 Wis. 2d 357, 367, 596 N.W.2d 805 (Ct. App. 1999). However, it argues that no jury question is presented where the intended use of the product is coupled with an inherent danger, citing ***Vincer v. Esther Williams All-Aluminum Swimming Pool Co.***, 69 Wis. 2d 326, 330-31, 230 N.W.2d 794 (1975) (absence of a self-latching gate to prevent child from entering swimming pool was an obvious defect); ***Arbet v. Gussarson***, 66 Wis. 2d 551, 225 N.W.2d 431 (1975) (smallness of a Volkswagen is an example of a danger that would be contemplated by an ordinary user); and ***Schilling v. Blount, Inc.***, 152 Wis. 2d 608, 449 N.W.2d 56 (Ct. App. 1989) (manufacturer of bullets had no duty to warn of danger of using product because loaded gun is an open and obvious danger). We do not read ***Vincer***, ***Arbet***, and ***Schilling*** as establishing a rule that the issue of whether a condition is an open or obvious danger ceases to be a matter for the jury when the intended use of the product is coupled with an inherent danger. We therefore reject this argument.

handholds or extenders; (2) failing to provide lighting (other than flashlights) for accessing and exiting the elevator top from the hatch; (3) failing to provide tie-off anchor points for millwrights to secure a safety harness; (4) waiting until after the accident to establish a standard operating procedure for accessing and exiting the elevator top; and (5) failing to provide elevator safety training for its millwrights. Schindler asserts that Mellom failed to produce any evidence to support the jury's verdict that GM's negligence was not a substantial factor in Douglas's death and that Douglas would not have died but for GM's causal conduct. We disagree.

¶39 We reject Schindler's contention that the jury could not logically find GM negligent without also finding that its negligence was a cause of Douglas's death. "[N]egligence and causation are separate inquiries and … a finding of cause will not automatically flow from a finding of negligence." ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 226, 270 N.W.2d 205 (1978). On the credible evidence, the jury could have found that, while GM was negligent, its negligence was not a substantial factor in Douglas's death. As we have explained, Mellom's safety expert, Dr. Barnett, testified that the lack of guardrails on the elevator top was "the sole proximate cause of [Douglas's] death." The safety expert testified that the elevator was defective because it did not have a standard guardrail, that the absence of a guardrail rendered the elevator unreasonably dangerous, making the lack of a guardrail "*the* cause" of Douglas's death. In his view, the absence of the guardrail was "the only issue," and that accessing the hatch played no role in causing Douglas's death. Viewing this evidence in the light most favorable to the verdict, we conclude a reasonable jury could find GM negligent but that its negligence was not a substantial factor in causing Douglas's death.

3. Verdict Question No. 11: Douglas Mellom's Negligence

¶40 Special verdict question no. 11 asked the jury whether Douglas was negligent "with respect to his own care and safety," to which the jury answered "no." Schindler argues the trial court erred by not setting aside this verdict because there was no credible evidence to support the verdict. The focus of this argument is on undisputed evidence that Douglas did not use a flashlight while servicing the elevator, and that he rejected Cisneros's offer of a flashlight. Schindler maintains that Douglas had a duty to exercise the same degree of care for his own safety that an ordinary prudent worker would exercise under the same or similar circumstances. Schindler argues that no person exercising reasonable care for his own safety would go on top of the elevator without a flashlight, and that Douglas's negligence in failing to use a flashlight while on top of the elevator was a substantial factor in causing his death.

¶41 We conclude, viewing the evidence in the light most favorable to the verdict, that the jury could have reasonably determined that Douglas was not negligent in causing his own death. Based on Cisneros's testimony, the jury could have reasonably believed that Douglas could, in fact, "see okay" without a flashlight, as he reported to Cisneros. The jury also heard testimony from millwright Letson that he (Letson) never used a flashlight in performing maintenance work on top of the elevator because the light was sufficient for him to do his job. Moreover, an Otis Elevator representative testified that the top of the elevator car was partially illuminated by fluorescent lights from inside the elevator car. Finally, as we have repeatedly discussed, Mellom's safety expert testified that the "sole" cause of Douglas's fall was the absence of guardrails on the top of the elevator. For these reasons, we conclude there was credible evidence to support the jury's verdict that Douglas was not contributorily negligent when he did not

use a flashlight while on top of the elevator, and therefore the trial court did not err in denying this part of the motion to set aside the jury's verdict.

4. Verdict Question No. 9: Otis Elevator's Negligence

¶42 Schindler next argues that the trial court erred by not setting aside the jury's verdict finding Otis Elevator was not negligent. Schindler points to an admission by an Otis mechanic that he was aware that GM was violating Wisconsin's elevator safety code by operating the elevator with an unsecured emergency exit and that he failed to inform GM about the code violation. The mechanic was responsible for inspecting, identifying and disclosing problems with the elevator to GM and to recommend necessary corrective action, which included providing notice of noncompliance to GM with applicable code regulations. According to Schindler, had the Otis mechanic informed GM that the elevator was being operated with an unsecured emergency exit in violation of the code, GM would have been able to take corrective action and prevented Douglas's death. In Schindler's view, the Otis mechanic was negligent when he failed to inform GM of the hatch problem, and this failure was a cause of Douglas's death.

¶43 We conclude the trial court did not err by denying Schindler's motion to set aside the jury's verdict finding Otis Elevator was not negligent. We do so for the same reasons we reject Schindler's arguments with respect to the jury's answers finding GM's negligence was not causal and finding Douglas was not contributorily negligent: there was credible evidence supporting Mellom's claim that the absence of guardrails on the top of the elevator was the sole cause of Douglas's fall.

C. Admission of the OSHA Citation

¶44 OSHA conducted an investigation of the accident and issued a citation to GM for a violation of OSHA workplace safety regulations. The citation charged GM with violating 29 C.F.R. § 1910.23(c)(1), which requires work platforms raised four feet or more above ground level to be guarded by standard railings.[5] "Platform" is defined within the regulations as "a working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment." 29 C.F.R. § 1910.21(a)(4).

¶45 Schindler contends that the OSHA citation was erroneously admitted into evidence at trial and that its admission was prejudicial. Specifically, Schindler advances three arguments for why the citation should not have been admitted into evidence: (1) the citation was issued by the agency upon an erroneous construction of its regulations and the trial court relied on the wrong legal standard in admitting the citation into evidence; (2) the trial court erred in treating the question of whether the top of an elevator is a work platform as a question of fact and not properly as a question of law; and (3) the citation was used by Mellom for improper purposes at trial.[6] Assuming for argument's sake

[5] Section 1910.23(c)(1) of 29 C.F.R. provides as pertinent: "Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder."

[6] Schindler also argues on appeal that the OSHA citation fails to meet the "trustworthiness" requirements of WIS. STAT. § 908.03(8). However, Schindler failed to raise this issue at trial or in its motion after verdict, and we therefore deem it forfeited. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to raise an argument in trial court proceedings may result in forfeiture of right to make that argument on appeal).

that the citation was erroneously admitted into evidence and that Mellom used the citation for an improper purpose at trial, we conclude that these errors were harmless.

¶46 Under the harmless error doctrine, "[a]n error does not require reversal unless it affects the substantial rights of the party seeking to set aside the judgment." ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714. The test for harmless error in civil cases is the same as that in criminal cases, which is whether it is clear beyond a reasonable doubt that a rational jury would have reached the same result or verdict absent the error. ***Id***., ¶¶57-58. We consider the entire record to determine whether an error is harmless. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶47 The record in this case is substantial. In the course of seven days, the jury heard testimony from twenty-two witnesses. Mellom's case focused primarily on the following theories: (1) the absence of guardrails on the top of the elevator rendered it unreasonably dangerous; (2) the likelihood of serious injury resulting from the design defect was unreasonably high; (3) Schindler knew that elevator mechanics and millwrights would be exposed to the fall hazard without guardrails, but chose not to install guardrails simply because Wisconsin's elevator code did not require them; (4) although both national and state elevator codes did not require installing guardrails on the tops of elevators, the codes did not prohibit it either; and (5) Schindler could have eliminated the unreasonable falling hazard without impairing the usefulness of the elevator and at minor expense.

¶48 In support of her theories, Mellom introduced testimony by her safety expert that the unguarded elevator top was an inherent and unreasonably dangerous condition and cross-examined Schindler's and Minnesota Elevator's

employees, experts, and introduced the OSHA citation. When viewed in the context of the entire record, the OSHA evidence was cumulative and constituted a small part of Mellom's case against Schindler. Even Schindler's own attorney argued to the court at the motion *in limine* hearing that the OSHA evidence was not relevant because it was cumulative. We also see from our review of the transcript of Mellom's closing argument that counsel paid little attention to the citation. To the extent that counsel discussed the citation, it was only to point out that OSHA apparently determined that the lack of guardrails created an unsafe work environment. Based on our review of the record, and contrary to Schindler's assertions, it is apparent that the OSHA evidence was not the "centerpiece" of Mellom's case. We are satisfied that the jury would have reached the same verdict even if the challenged evidence related to the OSHA citation had been excluded.

¶49 We make one final observation related to our conclusion that admitting evidence of the OSHA citation was harmless error. Schindler was able to blunt any suggestion by Mellom that Schindler violated OSHA regulations by presenting evidence that the OSHA citation was issued on improper grounds, specifically that the top of an elevator is not a "work platform" within the meaning of the OSHA regulation for which GM was cited for violating. Schindler also presented testimony from two of its employees that the elevator had complied with all applicable OSHA regulations at the time Schindler and Minnesota Elevator manufactured and installed it. Thus, Schindler had the opportunity to counter any suggestion by Mellom that Schindler had violated OSHA regulations by manufacturing and installing an elevator without guardrails on its top.[7]

[7] Schindler also asserts it is entitled to a new trial under WIS. STAT. § 805.15 because the cumulative effect of the trial court errors resulted in a verdict that is contrary to law and to the (continued)

CONCLUSION

¶50 For the foregoing reasons, we affirm in all respects the trial court's orders and the judgment entered upon the jury's verdict in favor of Mellom.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

---

weight of evidence. Because we conclude that the trial court committed no reversible error or, with respect to admitting the OSHA evidence any error committed by the trial court was harmless, we reject this argument.

In the alternative, Schindler seeks a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. Schindler argues the real controversy was not fully tried and that justice has been miscarried because the trial court admitted evidence about the OSHA citation and Mellom had misused this evidence, thereby confusing and misleading the jury. Because we have concluded that to the extent the trial court erred the error was harmless, we deny Schindler's request for a new trial.