COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1912 **Cir. Ct. No. 00CV000117**

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

FRANKENMUTH MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

MATTHEW J. KARBAN,

INVOLUNTARY-PLAINTIFF,

V.

BOR-MOR, INC.,

DEFENDANT-RESPONDENT,

ABC MANUFACTURING COMPANY, MORE PROPERLY IDENTIFIED AS CASE CORPORATION, DEF DISTRIBUTING COMPANY, MORE PROPERLY IDENTIFIED AS L.F. GEORGE, GHI INSURANCE COMPANY, JKL INSURANCE COMPANY AND MNO INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Oconto County: LARRY JESKE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Frankenmuth Mutual Insurance Company appeals a judgment entered on a jury's verdict finding that Case Bor-Mor Holdings, Inc., had no duty to warn users of the 400-TX hole-boring machine to attach stabilizer pads. Frankenmuth argues that the special verdict was too narrowly focused, preventing the jury from considering all the evidence, and that the trial court improperly allowed the jury to focus on Frankenmuth's status as an insurer. Frankenmuth also appeals an order denying its motions after verdict. We reject Frankenmuth's complaints and affirm the judgment and order.

Background

¶2 Matthew Karban owned and operated Karban Contractors. The business primarily installs overhead and underground electric, gas, television, and sewer lines. Karban, who began working for the company in fifth or sixth grade, had operated and maintained various machines over the years.

¶3 Karban became interested in purchasing a boring machine, which can lay cable or wiring underground without having to dig a ditch. Karban decided on the 400-TX, manufactured by Bor-Mor[1] and distributed by the

[1] The caption includes "Bor-Mor, Inc.," and "Case Corporation." From its answers, it appears that Bor-Mor merged with Case at some point to create Case Bor-Mor Holdings, Inc., and Bor-Mor captioned its brief accordingly. Frankenmuth simply refers to Bor-Mor as Case, although the record is unclear whether that is the appropriate name to use, because Case Corporation remains captioned as an individual entity.

L.F. George Company. L.F. George provided a training seminar to Karban's employees.

¶4 The 400-TX apparently tends to tip or be unstable unless stabilizing pads are attached to the machine. However, the jury heard evidence that the employees were informed both by the trainers at the seminar and by the operating manuals to use the stabilizing pads, although Frankenmuth disputes this.

¶5 Either late May 21 or early May 22, 1997, Karban attempted to fix a hydraulic leak on the 400-TX. He elevated the machine, then searched underneath for the leak. He used a solvent or lacquer thinner to try to clear some of the grease and oil, and used a trouble light to illuminate the underside of the machine.

¶6 Karban crouched to examine the drill rack area of the machine, but as he stood, the 400-TX fell over. Karban crawled from underneath the machine, but felt pain in his legs and realized they were on fire. He ran to a phone to call 911, then ran outside and lay down until help arrived. Karban suffered third-degree burns on approximately 20% of his legs.

¶7 Frankenmuth, Karban's worker's compensation carrier, then brought this action against Bor-Mor, alleging it was negligent in the manufacture, design, function, and distribution of the machine. Frankenmuth eventually withdrew all but the negligent distribution claim, which the trial court allowed to proceed as a claim that Bor-Mor negligently failed to warn of the 400-TX's allegedly unstable properties.

¶8 The jury determined Karban had been negligent with regard to his own safety and found that Bor-Mor owed no duty to warn. Frankenmuth's claim was therefore denied. Frankenmuth filed motions after verdict seeking a new trial,

alleging trial court error in creating one of the special verdict questions and in allowing the jury to know Frankenmuth's interests were separate from Karban's. The court denied the motions and entered judgment against Karban and Frankenmuth. Frankenmuth appeals.

Discussion

The Special Verdict

¶9 The trial court has wide discretion in creating the special verdict question. *See* ***Maci v. State Farm Fire & Cas. Co.***, 105 Wis. 2d 710, 719, 314 N.W.2d 914 (Ct. App. 1981). The verdict is to be "in the form of written questions relating only to material issues of ultimate fact and admitting a direct answer." WIS. STAT. § 805.12(1).[2] The special verdict form will not be upset by this court if the question, taken with the applicable jury instructions, fairly presents the material issues to the jury. *See* ***Murray v. Holiday Rambler, Inc.***, 83 Wis. 2d 406, 425, 265 N.W.2d 513 (1978).

¶10 Frankenmuth wanted the verdict to inquire: "Was the defendant, Bor-Mor/JI Case, negligent with respect to the manuals/instructions regarding the 400-TX?" Instead, the trial court adopted Bor-Mor's question: "[D]id Case Corporation have a duty to warn users not to elevate the 400-TX directional boring machine without attaching its stabilizer pads?"

¶11 Frankenmuth argues Bor-Mor's special verdict question was improper because it was too narrow. It argues Bor-Mor had a duty to warn of the

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

400-TX's instability and propensity to tip in general and that WIS JI—CIVIL 3246 requires a consideration of all possible dangers. In this case, Frankenmuth argues, there were other factors the jury should have considered beyond the stabilizer pads, including the placement of the rods, the degree of lifting of the machine, and its apparent tipping for no reason.

¶12 The pattern jury instruction, WIS JI—CIVIL 3246, reads:

> When a manufacturer (seller) undertakes, by printed instructions or otherwise, to advise the user of the machine (product) of the proper methods of its use, such manufacturer (seller), in the exercise of ordinary care, has the duty to give accurate and adequate information with respect to the use thereof and possible dangers involved with respect to the use of such machine (product).

¶13 Here, the evidence was undisputed that the 400-TX was stable under all circumstances addressed if the stabilizing pads were attached. Conversely, the clear implication is that the machine was unstable if the pads were not attached. Because it is the pads that affect the machine's stability—and, consequently, whether there were "possible dangers involved with respect to the use of such machine"—the ultimate factual question was properly narrowed to whether Bor-Mor had an obligation to warn that the pads were necessary to stabilize the machine. The special verdict fairly presented the material issue to the jury and will not be upset on appeal.

Reference to the Parties' Positions

¶14 Prior to trial, Frankenmuth sought to preclude the jury from being told that Karban was an involuntary plaintiff in the action, arguing the jury would somehow be prejudiced against Frankenmuth. It essentially relied on WIS. STAT. § 102.29, which grants a worker's compensation insurer the right to, effectively,

stand in the shoes of the injured worker and bring suit for recovery. The court asked how Frankenmuth intended to introduce the case to the jury. Frankenmuth's counsel responded it would be sufficient to identify Karban, who appeared pro se, as a plaintiff and "I am going to say that I represent Frankenmuth Mutual Insurance Company …. I'm trying to minimize it …. [W]hat I see the defense doing is they are going to go on the offense and make it an issue …."

¶15 The trial court denied the motion because, among other reasons, Bor-Mor had alleged the spoliation of evidence that could have proven exactly how the fire had started and that it had started before the 400-TX tipped. Frankenmuth distanced itself from Karban, claiming only he was in possession and control of the evidence.

¶16 Then, during opening arguments, Frankenmuth's counsel told the jury:

> I represent the plaintiff. …
>
> There is [sic] two parties in this case essentially. The first party is Dr. Karban. Dr. Karban's a local dentist. …
>
> … The other party is Case [Bor-Mor]. Case [Bor-Mor], as you are going to see, is a global corporation.
>
> ….
>
> So here the two parties are. How did the two parties in the world wind up in this courtroom?

¶17 Bor-Mor's counsel responded:

> Counsel told you that there were two parties. That's not the case. The parties are not just Case [Bor-Mor] and Dr. Karban. Mr. Ratzel doesn't represent Dr. Karban. … [He] represents only Frankenmuth …. And Frankenmuth is here only because … [t]hey're asking Case [Bor-Mor] to reimburse them for work comp payments.

¶18 Frankenmuth then moved for a mistrial, claiming the jury was tainted and prejudiced because Bor-Mor focused the jury's attention on Frankenmuth's interests alone. It argues that courts go to great lengths to insulate from a jury's deliberation the fact or presence of insurance coverage, and Bor-Mor attempted to deflect the emotions of this case by arguing about insurance, not about Karban's pain and suffering.

¶19 Under ***Stoppleworth v. Refuse Hideaway, Inc.***, 200 Wis. 2d 512, 523-24, 546 N.W.2d 870 (1996), all parties to an action, including insurance companies, should be identified to the jury. Frankenmuth ignores this rule. Rather, it argues that "it is impermissible in the present case for the defense to focus the jury's attention on Frankenmuth's efforts to recover worker's compensation benefits." However, Frankenmuth never really explains or shows how Bor-Mor's opening statement improperly focused the jury's attention or prejudiced it. To the extent there is an implicit argument that a jury is less likely to award damages to an injured plaintiff when an insurance company exists to pay for expenses, the issue of damages was not before the jury. It apparently had been bifurcated and the jury was only asked to consider the issue of liability.

¶20 Additionally, in ***Stoppleworth***, the court noted that WIS JI—CIVIL 125 was a proper curative instruction to protect against unfair prejudice, reminding the jury that the presence of insurance is irrelevant to the issue of liability. ***Id.*** at 524-25. Here, the court gave the jury that instruction, reminding the jury that Bor-Mor's liability was not connected to Karban's insurance coverage. We presume juries follow their instructions. ***State v. Smith***, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992).

¶21 Moreover, counsel has a duty to refrain from making misrepresentations. Under SCR 20:3.3(a) (2001-02), a lawyer shall not knowingly make a false statement of fact or law to a tribunal. While we have no reason to believe Frankenmuth intended to mislead the jury, its opening statements did just that. By stating he represented the plaintiff, and that only Karban and Bor-Mor were the parties, Frankenmuth's counsel implied he represented Karban, which was inaccurate. Although WIS. STAT. § 102.29 allows the insurer to step into the worker's shoes to file a claim, this is not akin to representing the worker. This is particularly true here because Frankenmuth had to separate itself from Karban on the spoliation issue. In any event, the trial court's decision effectively permitting an inaccuracy to be corrected does not amount to improperly focusing the jury's attention on impermissible matters.

¶22 Consequently, we see no reason why the trial court should have prevented Bor-Mor from correcting Frankenmuth's opening statements.[3] On appeal, Frankenmuth is asking us to review what we consider to be invited error, and we generally do not address invited errors. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (if error occurred defense counsel invited it), and ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (appellant cannot complain of errors induced by appellant).[4]

[3] Frankenmuth points to no other portion of the record where Bor-Mor raised its status as an insurance company. Indeed, the only record citation Frankenmuth did provide was not to the opening statements, but to the trial court's oral decision on Frankenmuth's motion. *See* WIS. STAT. RULE 809.19(1).

[4] Bor-Mor also argues that an insurer's right to bring suit is derivative of the worker's right and claims that because Karban failed to appeal, Frankenmuth lost standing to bring its own appeal. Because we decide the case on other grounds, we need not address this argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

By the Court.—Judgment and order affirmed.

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