COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3512 **Cir. Ct. No. 02CV000185**

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

GLORIA J. UNZEN,

PLAINTIFF-APPELLANT,

V.

OVERHEAD DOOR COMPANY OF DULUTH AND MERIDIAN INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

LAKEHEAD PAINTING COMPANY, INC. AND TRAVELERS PROPERTY AND CASUALTY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

JEAN A. SWEENEY, HARTFORD INSURANCE COMPANY AND BELLINO INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed and cause remanded with directions*.

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

¶1 PER CURIAM. Gloria Unzen appeals a judgment, entered upon a jury verdict, dismissing her claim for the wrongful death of her husband, Richard Unzen. The jury found that Richard's negligence was greater than that of any other driver. Unzen argues that Richard, as a matter of law, was not negligent and that the circuit court therefore erred by denying her motion for judgment notwithstanding the verdict or, alternatively, a new trial.[1] She contends that Overhead Door Company's negligence was the sole cause of Richard's death. We conclude there is sufficient evidence to support the jury's apportionment of negligence and affirm the judgment and order. Further, because Unzen advances no argument against Lakehead Painting Company, we conclude Unzen's appeal against Lakehead is frivolous and therefore Lakehead is entitled to appellate costs and attorney fees. We remand to the circuit court to determine the amount to be awarded.

BACKGROUND

¶2 This case arises from a multiple vehicle accident that occurred on the Blatnik Bridge, which runs between Duluth, Minnesota, and Superior, Wisconsin.

[1] Although Unzen sought a new trial in her postconviction motion, she does not make that argument in her brief-in-chief in this court. In her reply brief, Unzen asks this court to use its discretionary power of reversal to grant a new trial. However, we decline to address arguments raised for the first time in the reply brief. ***Palmerton v. Associates' Health & Welfare Plan***, 2003 WI App 41, ¶15 n.3, 260 Wis. 2d 179, 659 N.W.2d 183.

On April 22, 2002, two Overhead Door employees were traveling in a company truck from Duluth to Superior over the bridge. While they were on the center superstructure of the bridge, a ladder on the outside of their truck fell onto the roadway in the left lane of traffic. Because the center superstructure has only a narrow shoulder, the employees continued over the bridge until they were able to pull out of traffic onto the shoulder of the road.

¶3 Richard, an off-duty Minnesota Department of Transportation employee, attempted to retrieve the ladder from the roadway. Richard stopped his pick-up truck on the right side of the road, at least partially blocking the right lane of traffic, and activated his emergency lights. Richard got out of his truck and began walking down the roadway in front of his truck.

¶4 Some vehicles successfully avoided the ladder lying in the left lane by driving around it in the right lane. Jeffrey Carswell was driving in the left lane when a little blue car that had been traveling in the right lane suddenly swerved into the left lane and stopped.[2] Carswell was able to stop his vehicle without colliding with the blue car. However, Daniel Bowen, who was traveling in the left lane behind Carswell, did not stop before his vehicle struck Carswell's vehicle. Bowen's vehicle was then struck from behind by Jean Sweeney, causing Bowen to hit Carswell a second time. Finally, a van driven by a Lakehead employee struck Sweeney's vehicle, causing Sweeney's vehicle to careen into the right lane and strike Richard, who was then a pedestrian on the bridge. Richard was propelled over the side of the bridge, falling to his death.

[2] The driver of the little blue car was never identified.

¶5 On May 29, 2002, Gloria Unzen filed a complaint against Overhead Door, Lakehead, Sweeney, Bowen, Carswell, and their insurers, alleging they were responsible for the wrongful death of Richard. Unzen settled her claims against Carswell, Bowen, Sweeney, and their insurers, before trial.

¶6 On August 5, 2003, a three-day jury trial commenced. The jury apportioned causal negligence as follows: 45% to Richard, 30% to Overhead Door, 15% to Lakehead, 5% each to the blue car and Sweeney, and 0% to Carswell and Bowen.

¶7 Unzen filed a motion for judgment notwithstanding the verdict or, alternatively, a new trial. She contended that Richard, as a matter of law, was not negligent and asked the court to apportion 45% of the negligence to Overhead Door and 45% to Lakehead. The circuit court denied the motion.

DISCUSSION

¶8 Unzen challenges the jury's apportionment of negligence, contending that Richard was not negligent. Unzen argues that Overhead Door's original negligence in dropping the ladder on the bridge caused all subsequent events and was the sole proximate cause of Richard's death.

¶9 While Unzen has contended throughout this case that Richard is not negligent, she argues for the first time on appeal that Overhead Door is solely responsible for Richard's death. Generally, we do not address arguments raised for the first time on appeal. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Nevertheless, we conclude that there is sufficient evidence to support the jury's verdict.

¶10 "The comparison and apportionment of causal negligence are peculiarly within the province of the jury." ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996). Accordingly, when we review a jury's apportionment of negligence, we search the record for any credible evidence to support the jury's verdict, accepting any reasonable inferences drawn from that evidence. ***Id.*** We are even more deferential when, as here, the jury's verdict has been approved by the circuit court. ***Id.***

¶11 There is sufficient evidence for the jury to conclude that Richard was 45% causally negligent. The jury heard testimony that before Richard stopped his vehicle in the right lane and became a pedestrian on the bridge, several vehicles were able to avoid the ladder by driving around it. Evidence was also introduced that Richard had no responsibility, as an off-duty Minnesota Department of Transportation worker, to remove the ladder. There was testimony that department employees are required to set up proper traffic controls and wear appropriate clothing before attempting to remove debris from a roadway. There was also testimony that traffic laws forbid stopping in traffic and walking on the bridge. Thus, the jury could conclude that Richard's actions of stopping his vehicle in traffic and walking on the roadway, in violation of traffic laws and department safety procedures, substantially contributed to his death.

¶12 Lakehead contends that Unzen's appeal against it is frivolous and requests reasonable attorney fees and costs. *See* WIS. STAT. RULE 809.25(3).[3] We may conclude an appeal is frivolous if "[t]he party or the party's attorney knew, or

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

should have known, that the appeal … was without any reasonable basis in law ….” WIS. STAT. RULE 809.25(3)(c)2. Unzen named both Lakehead and Overhead Door as respondents in this appeal. However, Unzen has abandoned her circuit court argument that Lakehead and Overhead Door are equally negligent. On appeal, she argues that Overhead Door is solely responsible for Richard’s death. Unzen gives no reason, and we can imagine none, for naming Lakehead as a respondent in this appeal in the first place or, at a minimum, for failing to voluntarily dismiss it. *See* WIS. STAT. RULE 809.19. Therefore, we conclude that Unzen’s appeal against Lakehead is frivolous because Unzen’s attorney should have known that the appeal had no basis in law. *See* WIS. STAT. RULE 809.25(3). Unzen’s attorney shall pay Lakehead’s reasonable appellate attorney fees and costs. *See* WIS. STAT. RULE 809.25(3)(a). We remand to the circuit court for a determination of the amount.

By the Court.—Judgment and order affirmed and cause remanded with directions.

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