COURT OF APPEALS
DECISION
DATED AND RELEASED

November 8, 1995

NOTICE

No. 94-0247

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

RICHARD L. AUSTIN, SR., Individually, and as the Special Administrator of the ESTATE OF JENNIFER L. AUSTIN, and THERESA A. AUSTIN,

Plaintiffs-Respondents,

v.

NOVA SERVICES, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed*.

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

PER CURIAM. Nova Services, Inc. appeals from a judgment in favor of Theresa A. Austin and Richard L. Austin, Sr., individually and as the special administrator of Jennifer Austin's estate. The Austins brought a wrongful death action against Nova after their daughter, Jennifer, died while on a Lake Michigan outing with a Nova staff member. On appeal, Nova challenges several of the trial court's evidentiary rulings, its refusal to reduce the pain and

suffering award and the propriety of the plaintiff's closing argument. We see no error in the trial court's exercise of its discretion in these areas and affirm.

At the time Jennifer died, she was residing at a shelter care facility operated by Nova. On August 8, 1991, Jennifer and four other teenage residents went on an outing to Lake Michigan. They were supervised by a Nova employee, Bethany Zerfas.

Despite rough water and high waves, Zerfas twice allowed the teenagers to walk out onto a long pier. Before the first trip, waves were crashing over the five-foot vertical wall dividing the pier and hitting the harbor side of the pier where Zerfas told the teenagers to walk. There was testimony at trial that the conditions at the pier were among the worst ever seen. After again receiving permission from Zerfas to walk on the pier, the teenagers again walked on the harbor side of the vertical wall. However, on the way back, they passed through cracks in the wall and walked on the lake side. Waves were crashing over the walking surface and the teenagers were holding onto a cable attached to the vertical wall. Jennifer was pulled into the lake after being hit by a wave. She struggled in the water for as long as ten minutes, periodically going beneath the water and resurfacing. She was also thrown against a metal part of the pier by the force of the waves. Ultimately, she disappeared beneath the water.

One of the teenagers ran to shore to get help, and Officer Ronald Kridler of the Port Washington police department responded within minutes of the time Jennifer was last seen above the water. He was unable to locate Jennifer from the pier and returned to shore to continue his investigation. During interviews with the police, the distraught teenagers did not say that Jennifer had been reckless or failed to hold the cable while she was on the pier.

Nova desired to present evidence regarding Jennifer's troubled past, alleged suicidal ideations, substance abuse and juvenile delinquency disposition on a retail theft charge. Nova contended that Jennifer's difficulties were relevant to her parents' claim for loss of society and companionship. Additionally, Nova argued that evidence regarding Jennifer's recklessness and potential disregard for her own life was relevant to whether she was contributorily negligent in her death.

The trial court declined to permit Nova to present evidence regarding Jennifer's suicidal ideations because it would cause the jury to speculate that Jennifer's death was somehow linked to those ideations or other aspects of her character. The trial court concluded that the probative value of such evidence was outweighed by the danger of juror speculation. With regard to Jennifer's juvenile disposition for retail theft, the trial court found that such evidence would defeat the intent of ch. 48, STATS., that juvenile proceedings remain confidential. Finally, on the question of Jennifer's alleged substance abuse, the trial court stated that its probative value was outweighed by its prejudicial effect.

Evidentiary matters are within the trial court's discretion. ***Gonzalez v. City of Franklin***, 137 Wis.2d 109, 139, 403 N.W.2d 747, 759 (1987). We will uphold the trial court's discretionary decision if that decision has a reasonable basis and was made in accord with accepted legal standards and the facts of record. *See* ***Chomicki v. Wittekind,*** 128 Wis.2d 188, 195, 381 N.W.2d 561, 564 (Ct. App. 1985).

Nova argues that the trial court's ruling prohibited it from exploring the impact of Jennifer's difficulties upon her relationship with her parents, who were seeking to recover for loss of society and companionship. However, as the Austins point out in their brief, the jury heard evidence that Jennifer was a habitual runaway and had significant conflicts with her parents, particularly her mother. Evidence was also introduced that Jennifer had scars from self-abuse and that she claimed to be afraid of her parents. Therefore, the jury was not deprived of this evidence or the opportunity to consider it in assessing her parents' claim.[1]

While Nova reviews all of the evidence of Jennifer's difficulties it wanted before the jury, it does not distill this recitation into an argument, supported by citation to authority, as to why the trial court misused its discretion in excluding this evidence. Because Nova's argument is lacking, we do not address it in detail. *See* ***Fritz v. McGrath,*** 146 Wis.2d 681, 686, 431

[1] We note that the jury awarded $40,000, less than the maximum possible award, to Jennifer's parents for loss of society and companionship.

N.W.2d 751, 753 (Ct. App. 1988). Our review of the record indicates that the trial court properly exercised its discretion in excluding this evidence.

Nova also challenges the trial court's refusal to permit it to cross-examine Jennifer's parents regarding her past conduct, including juvenile court proceedings, drug use, suicide attempts and mental illness. We have already held that the trial court properly excluded this evidence. Because the evidence was inadmissible, the trial court properly exercised its discretion restricting cross-examination in this area. *See* ***Peissig v. Wisconsin Gas Co.,*** 155 Wis.2d 686, 702, 456 N.W.2d 348, 355 (1990).

Nova complains that its cross-examination of Barbara Badini, an Austin family friend, was unreasonably restricted because the trial court precluded cross-examination regarding Jennifer's siblings' criminal records. Nova wanted to demonstrate on cross-examination that the Austins were not a "big, happy, well-rounded family," as Badini had testified. Nova argues that evidence of Jennifer's difficulties and the criminal records of her siblings would have been useful to the jury in assessing whether the Austin family was a happy one and whether Jennifer herself was "happy, innocent, [and] carefree" or "very troubled, wild and reckless ... whose conduct on the pier may well have been affected by her very troubled state of mind."

The claim to be determined at trial was Jennifer's parents' claim for loss of society and companionship. While the conduct of Jennifer's siblings might, in some respect, illuminate the family dynamics, "evidence regarding the past conduct or indiscretions of family members" is not relevant to the Austins' claim for loss of society and companionship of one of their children. *See* ***Strelecki v. Firemans Ins. Co. of Newark***, 88 Wis.2d 464, 481, 276 N.W.2d 794, 801 (1979).

We also fail to see how her siblings' criminal records illuminate Nova's theory that Jennifer's conduct on the pier "may well have been affected by her very troubled state of mind."

Nova complains that the trial court erroneously permitted Officer Kridler, who arrived on the scene shortly after Jennifer disappeared under the

water and who assisted in the investigation, to testify that given the wave conditions he observed that day, he would not have allowed his seventeen-year-old nephew to go out on the pier. Nova objected on the grounds that Kridler was not qualified to give an expert opinion. The trial court admitted Kridler's testimony as lay opinion.

Section 907.01, STATS., governs opinion testimony by lay witnesses:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

The admission of opinion evidence is within the trial court's sound discretion. ***Pattermann v. Pattermann***, 173 Wis.2d 143, 152, 496 N.W.2d 613, 616 (Ct. App. 1992). We conclude that the trial court properly exercised its discretion because Kridler's lay opinion regarding the advisability of allowing teenagers to walk on the pier was based upon his observations shortly after Jennifer disappeared.

Kridler testified that when he arrived on the scene, the waves were continuously crashing over the vertical wall dividing the pier. He stated that the wave conditions on that day were "one of the more intense or worse than I have seen." Kridler said that while walking on the pier, he was very concerned for his own safety because the waves were crashing onto the pier. The question to Kridler focused on the conditions on the pier that day. The trial court properly allowed Kridler to give his lay opinion based on his perception of the conditions that day and because his opinion aided the jury in assessing the conditions on the pier that day.

An issue arose at trial as to whether Jennifer was holding the cable before she was swept into the lake. During an offer of proof, Kridler testified that he took written statements from the four teenagers who had been on the

pier with Jennifer. In those statements, none of the teenagers stated that Jennifer failed to grasp the cable. The implication of this testimony is that Jennifer was holding the cable before she was swept off the pier. The statements were taken approximately fifteen minutes after Kridler arrived at the scene, which was shortly after Jennifer disappeared under the water. The trial court ruled that the statements were admissible as excited utterance exceptions to hearsay under § 908.03(2), STATS.[2]

When the jury returned to the courtroom, Kridler testified that the teenagers told him they were holding the cable when a wave struck them, washing Jennifer off the pier. From those statements, Kridler testified that he understood that all the teenagers, including Jennifer, were holding the cable when Jennifer was swept in.

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Section 908.03(2), STATS. This exception to the hearsay rule "is based in the spontaneity of the statements and the stress of the incident which endow the statements with the requisite trustworthiness necessary to overcome the general rule against admitting hearsay evidence." ***State v. Moats***, 156 Wis.2d 74, 97, 457 N.W.2d 299, 309 (1990).

We agree with the trial court that the teenagers' statements to Kridler approximately fifteen minutes after Jennifer disappeared were made under the stress of the incident and had sufficient indicia of trustworthiness. While Nova contends that it is "clear" that the statements were not excited utterances, it does not expand upon this contention.

Nova challenges the jury's award to Jennifer's estate of $225,000 for her conscious pain and suffering. Nova argues that this sum is unreasonable given that Jennifer struggled in the water for only seven and one-half minutes before she disappeared.

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[2] The trial court also admitted the statements as present sense impressions under § 908.03(1), STATS. Because we affirm the trial court's excited utterance ruling, we do not address this alternate ground for admitting the testimony.

The amount of damages is largely within the jury's discretion. ***Carl v. Spickler Enters., Ltd.***, 165 Wis.2d 611, 625, 478 N.W.2d 48, 54 (Ct. App. 1991). We will not disturb a jury's damages award if there is any credible evidence which under any reasonable view supports the award, especially if the trial court has approved the verdict. ***Id***. The trial court declined to reduce the pain and suffering award after trial.

Nova argues that the pain and suffering award was excessive when compared with awards in other cases where the duration of pain and suffering was much longer. However, our standard of review is whether there is any credible evidence in this case which, under any reasonable view, supports the jury's damages award. ***Id.*** There was credible evidence regarding the nature and degree of Jennifer's conscious pain and suffering while she was in the water. Dr. Rita McDonald, a psychologist, testified about the physiological and psychological trauma Jennifer experienced. The teenagers who witnessed Jennifer's struggle testified that for as long as ten minutes, she cried, shouted for help, struggled and was thrown against the pier before she disappeared. We conclude that there is credible evidence which reasonably supports the jury's pain and suffering award.

Finally, Nova argues that the plaintiffs improperly argued that the jury should award damages to Jennifer's estate based upon the number of years of life she lost, rather than her conscious pain and suffering. Nova's argument is without merit because the record does not bear out Nova's characterization of the plaintiffs' closing argument. After Nova objected to what it perceived to be the plaintiffs' argument that Jennifer's estate should be compensated for the years of life she lost, plaintiffs' counsel clarified for the jury that he was asking them to consider Jennifer's mental anguish as she realized that she would not live a life of normal duration. Thereafter, in its instructions to the jury, the trial court advised the jury that it should award damages for the pain and suffering endured by Jennifer until she died. We presume that jurors follow the instructions given to them. ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 457 n.20, 405 N.W.2d 354, 378 (Ct. App. 1987).

By the Court.—Judgment affirmed.

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