COURT OF APPEALS
DECISION
DATED AND RELEASED

August 15, 1995

No. 94-2954

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

ROBERT DESMARAIS,

Plaintiff-Appellant,

v.

DUMAR CHEMICALS, INC.
and SCOTTSDALE INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Robert DesMarais appeals from a judgment, after a jury trial, dismissing his negligence action against DuMar Chemicals, Inc., and its insurer, Scottsdale Insurance Company, for fire damage to his automobile. In 1989, DesMarais, then-president of DuMar, stored his 1958 Ferrari in a shed adjacent to the DuMar factory. A fire broke out and destroyed the factory, the shed, and the Ferrari. DesMarais had not insured the automobile. He then

commenced the negligence action, alleging that the fire was caused by the negligence of a DuMar employee and that DuMar and its insurer were liable "for damages in the amount of the value of the [destroyed] Ferrari." The action went to trial and the jury found DesMarais sixty percent causally negligent, and DuMar forty percent causally negligent in the destruction of the car. DesMarais filed several motions after the verdict, seeking to change the jury's answers to the special verdict concerning DesMarais's causal negligence and the allocation of negligence between the parties. The trial court denied the motions and entered judgment, dismissing the action.

Upon appeal, DesMarais presents two issues for our review: (1) whether the trial court erred in denying his motion to change the jury's answers to the special verdict; and (2) whether as a matter of law he could not be found liable in his capacity as president of DuMar because such liability could only result from his failure to exercise his supervisory control and such evidence was not present in this case.

Because we conclude that there is credible evidence supporting the jury's answers to the special verdict, and because we conclude that DesMarais waived his right to challenge the verdict based upon the issue of his "supervisory control" in that he failed to ask for jury instructions on the issue, we affirm.

A motion to change a jury's verdict answer challenges the sufficiency of the evidence to sustain the answer. *See* § 805.14(5)(c), STATS.[1]

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[1] Section 805.14, STATS., reads in relevant part:

> **Motions challenging sufficiency of evidence; motions after verdict. (1)** TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom 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 party.
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> ....

Accordingly, a reviewing court will not upset a verdict, including the jury's apportionment of negligence, if any credible evidence supports it. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154, 368 N.W.2d 666 (1985). This evidence must "under any reasonable view support[ ] the verdict and remove[ ] the question from the realm of conjecture." ***Gonzalez v. City of Franklin***, 128 Wis.2d 485, 494, 383 N.W.2d 907, 911 (Ct. App. 1986), *aff'd*, 137 Wis.2d 109, 403 N.W.2d 747 (1987). We look for credible evidence to sustain a jury's verdict, ***Ferraro***, 119 Wis.2d at 410-11, 350 N.W.2d at 737, and "[t]he credibility of witnesses and the weight afforded their individual testimony is left to the jury." ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). Further, even though more than one reasonable inference may be drawn from the evidence, we must accept the jury's choice. *See* ***Ferraro***, 119 Wis.2d at 410-11, 350 N.W.2d at 737.

The trial court did not err by failing to grant DesMarais's motion to change the verdict answers. Ample evidence supported the jury's findings as to DesMarais's causal negligence and the apportionment of negligence. The evidence showed that only DesMarais had the keys to the Ferrari and only one other person had keys to the locked shed; that he stored the Ferrari at DuMar, even though corporate policy prohibited storing personal property on DuMar property. Further, there was evidence that in his role as president of DuMar, DesMarais was responsible for supervising and controlling all of the affairs and business of the company and that in that role he was aware of the dangers of storing the car on company property. Such evidence includes: DesMarais's knowledge of the factory's use of the flammable chemical, Therminol, which was the cause of the fire when it leaked from a pipe and ignited (In fact, DesMarais testified that it was his decision to use Therminol at the factory.); failure to use proper insulation on the Therminol system to prevent fires; and management's knowledge that the factory's fire extinguishers were not always kept in optimal operating conditions and that factory employees engaged in horseplay with the extinguishers.

(..continued)

(5) MOTIONS AFTER VERDICT.

....

(c) *Motion to change answer*. Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer.

DesMarais also argues that his negligence could not be derived from his actions as president of DuMar because the evidence does not show that he failed to exercise his supervisory authority. Whatever merit this argument may have, DesMarais waived the issue by failing to request jury instructions which would have clarified the "supervisory authority" issue for the jury. *See* ***Leckwee v. Gibson***, 90 Wis.2d 275, 289, 280 N.W.2d 186, 192 (1979) (appellant raising legal theory upon appeal is not entitled to change in jury answers because appellant failed to seek jury charge on legal theory and this failure equals waiver of the issue). We conclude that ample credible evidence sustains the jury's answers as to the parties' causal negligence. The trial court properly denied DesMarais's motions and dismissed the action.

By the Court.—Judgment affirmed.

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