COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2011

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

BETTY SADOWSKY, Individually and as Personal Representative of the Estate of JOHN A. SADOWSKY, Deceased,

Plaintiff-Appellant,

v.

THE ANCHOR PACKING CO., and GARLOCK, INC.,

Defendants-Respondents,

THE A.P. GREEN REFRACTORIES CO., ARMSTRONG CONTRACTING & SUPPLY CO., a/k/a AC&S, ARMSTRONG WORLD INDUSTRIES, INC., COLT INDUSTRIES n/k/a KOLTEZ INDUSTRIES IND., GAF CORP., FIBREBOARD, FLEXITALLIC, KEENE CORP., NATIONAL GYPSUM CO., OWENS-ILLINOIS, INC., PITTSBURGH CORNING, SPRINKMANN SONS CORP., TAYLOR INSULATION CO., INC., TURNER NEWELL, As Agent of KEASBEY-MATTISON, INC., and UNITED STATES GYPSUM CO.,

Defendants,

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Third Party Plaintiff-Respondent,

MANVILLE,

Third Party Defendant.

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

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Betty Sadowsky, individually and as personal representative of the estate of John Sadowsky, deceased, (Sadowsky), appeals a judgment and order dismissing her claims arising out of her late husband's death caused by lung cancer. Sadowsky argues that the trial court made several erroneous evidentiary rulings, each which will be discussed in turn.

Sadowsky also argues that the trial court erroneously precluded evidence and argument concerning Anchor Packing Co. and Garlock Inc.'s negligence for failure to warn and, finally, that the trial court erroneously struck Sadowsky's punitive damage claim. We reject her challenges and affirm the judgment and order. We also award the respondents costs on appeal, motion costs, and a penalty to be paid by Sadowsky's attorneys for failure to abide by § 809.19(1)(e), STATS.

Sadowsky filed this tort action against manufacturers and distributors of asbestos products, alleging that as a result of exposure to asbestos containing products over the course of John Sadowsky's career as a steam fitter, he developed lung cancer and died. The jury found in favor of the defendants and this appeal followed.

STANDARDS OF REVIEW

In order to preserve a claim of error for appellate review, in the case of a ruling admitting evidence, the record must reveal a timely objection stating specific grounds. Section 901.03(1), STATS. In case the ruling excludes evidence, an offer of proof is required. ***Id.*** Also, if the court erred, reversal is required only if the improper ruling has affected the substantial rights of the party seeking relief. Section 805.18(2), STATS.

The appellant must provide citations to the record in support of its argument. Section 809.19(1)(e), STATS. Failure to cite any record reference demonstrating an objection to claimed error permits us to decline review of the issue on appeal. ***Tam v. Luk,*** 154 Wis.2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990); § 809.83, STATS.

Evidentiary issues are addressed to the trial court's discretion. ***State v. Pharr,*** 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). In the event the trial court does not articulate its reasons for its evidentiary ruling, we are to review the record to determine whether it provides a basis for the trial court's discretionary determination. ***Id.*** at 343, 340 N.W.2d at 502. The exercise of discretion leaves areas where reasonable minds may differ. *See* ***Hartung v. Hartung,*** 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). But as long as the court reaches a decision within the parameters of reasonableness, it is inappropriate to interfere with the trial court's exercise of discretion. ***Barrera v. State,*** 99 Wis.2d 269, 282, 298 N.W.2d 820, 826 (1980).

"We will not overturn a discretionary determination on a ground not brought to the attention of the trial court." ***State v. Foley,*** 153 Wis.2d 748, 754, 451 N.W.2d 796, 798 (Ct. App. 1989). An appellant may lose the right to complain that the trial court failed to exercise discretion if the appellant failed to request the court to do so. ***McClelland v. State,*** 84 Wis.2d 145, 157-58, 267 N.W.2d 843, 848-49 (1978).

These standards require Sadowsky to cite a record reference to each objection and offer of proof, as well as a reference to the trial court's decision on the basis of her specific objection. With these standards in mind, we turn to her specific claims of evidentiary error.

1. Videotape Demonstration

Sadowsky argues that the trial court erroneously rejected a videotape demonstration to show a person cutting Owens-Corning Fiberglas Corp.'s (OCF) pipe coverings, offered for the purpose of showing "what the product looked like and how much dust it created when it was cut." The pipe in the video was "non-asbestos kaylo pipe" purchased from an OCF distributor. At her offer of proof, Sadowsky offered to produce testimony that the non-asbestos material in the video was similar to an asbestos product in creating dust to which Sadowsky was exposed.

A videotaped recording is subject to the same rules of admissibility as photographic evidence in general. Section 910.01(2), STATS. The test for admissibility is whether the demonstration was conducted under facts comparatively similar to the event in question. *See* ***Keplin v. Hardware Mut. Cas. Co.,*** 24 Wis.2d 319, 331-32, 129 N.W.2d 321, 327 (1964). Photographic evidence should be admitted if it will help the jury to gain a better understanding of facts. ***Hayzes v. State,*** 64 Wis.2d 189, 200, 218 N.W.2d 717, 723 (1974). The trial court refused the videotaped demonstration on the ground that the probative value was outweighed by its prejudicial effect. Sadowsky's offer of proof fails to demonstrate that the conditions under which the video was made, and the conditions under which Sadowsky worked, were comparatively similar. The court could conclude that a visual display of non-asbestos dust was not probative of the amount of actual asbestos dust Sadowsky inhaled. Consequently, it was reasonable for the trial court to reject the proffered evidence.

2. Juneau Village Specifications

Sadowsky sought to introduce the specifications from the Juneau Village project on which Sadowsky worked. Sadowsky had an invoice showing kaylo was delivered to it and wanted the specifications admitted to show that they called for it. Sadowsky argues the specifications are admissible as an ancient document exception to the hearsay rule because they are over twenty years old, are accompanied by a sworn certificate of authenticity by the Juneau Village maintenance director and were found where they should have been found. *See* §§ 909.015(8), 909.02(8) and 908.03(16), STATS. The trial court concluded that they were not ancient documents, but may be business records.

However, because no custodian or other qualified witness was present to lay the foundation under § 908.03(6), STATS., the trial court rejected the evidence.

We conclude that Sadowsky fails to demonstrate prejudice from the denial of the specifications. Sadowsky's conclusory statement that she was prejudiced is insufficient. Absent some suggestion, for example, that this item of evidence was not cumulative to other proof that Sadowsky was exposed to asbestos, her argument discloses no prejudice. Without a showing of prejudice, no reversible error is established. Section 805.18, STATS.

3. Minutes of the Asbestos Textile Institute Meeting of March 7, 1956

Sadowsky argues that the trial court committed reversible error by rejecting minutes of the Asbestos Textile Meeting of March 7, 1956. They were offered under the ancient document and business record exception to the hearsay rule. Sections 909.01, 909.015, 908.03(6) and 908.03(16), STATS. These minutes were offered to show Garlock's knowledge of the dangers of asbestos exposure. Garlock objected on the grounds that the minutes did not show Garlock's knowledge: "These are not statements made by anyone from Garlock. What counsel is going to try to infer is merely because Garlock was at this meeting that somehow they approve these statements."

In response, Sadowsky argued that Garlock was a member of the Asbestos Textile Institute [ATI] at the time of the meeting, that it had two representatives at the meeting and that "Doctor Goodman was speaking as a member of the American Textile Institute so he's not speaking on his own behalf." At trial, Sadowsky argued: "The conspiracy law in Wisconsin would apply here, that when people get together for acts, that one is held responsible for the other's acts and in this context, Judge, we have them being a member and him speaking as a member so there is the tie there for that law to apply." The trial court sustained Garlock's objection, stating that it was hearsay.

Sadowsky does not tell us what part of the four-page exhibit shows Garlock's actual knowledge of the danger of asbestos, so we have reviewed the entire exhibit. The minutes do not reflect a Dr. Goodman was present. One Garlock representative was present. A *Dr. Kenneth Smith* (not Goodman) spoke on the lung cancer epidemic and a Pennsylvania case:

> The finding by the referee in this case was Asbestos-Cancer. The referee in this case quoted in his decision Dr. Hueper's writings from the Public Health Nomograph No. 36 U.S. Public Health Service. ... Dr. Hueper claims that Asbestosis-Cancer can be found after exposure of 6 months to 42 years in ages of people from 25 to 65 years.

The trial court correctly recognized multiple layers of potential hearsay; the minutes were a written expression of a speech by Smith who was quoting a Pennsylvania referee who relied upon writings of Hueper. The record of Sadowsky's offer of proof, as well as her appellate brief, fail to reveal by what method she would lay the foundation for authentication, or what custodian would qualify the exhibit as a business record. However, these deficiencies do not go to the core of the evidentiary issue at hand.

Because the exhibit was offered to show notice to Garlock, it was not shown for the truth of the matter stated within, but rather for the effect of the information on Garlock. Offered for that purpose, the exhibit would not have been hearsay. Section 908.01(3), STATS. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ***Id.*** Sadowsky does not make this argument on appeal, nor does she indicate that she made this argument to the trial court. Our review of the evidentiary hearing fails to indicate this argument was made to the trial court. Sadowsky argues that the trial court did not allow her to argue the hearsay issue. We disagree. After the court ruled it hearsay, Sadowsky stated: "It's an official report." She did not state that it was not offered for its truth. We will not reverse the trial court for an evidentiary ruling on grounds not specifically stated.

4. OCF Chart

Sadowsky argues that the OCF chart is relevant to show its knowledge of dangers related to asbestos containing products. The chart displayed asbestos containing products from 1938 to 1990. It contends that the trial court erred when it rejected it.

Because Sadowsky fails to provide a cite to the record demonstrating her offer of proof, we do not review this claim of error. *See* §§ 809.19(1)(e), 809.83(2) and 901.03(1), STATS. A cite only to the exhibit is insufficient, because it fails to identify the offer of proof Sadowsky made. The reviewing court need not sift the record for support to counsel's argument, especially here, where it numbers in the thousands of pages. *See* ***Keplin,*** 24 Wis.2d at 324, 129 N.W.2d at 323.

5. November 4, 1983, Federal Registrar Tables

The tables purported to show the number of people expected to develop asbestos-related disease as a result of exposures below the then existing threshold limit value. Sadowsky contends that the trial court erroneously rejected the tables. Again, she fails to cite us to the record containing her offer of proof. *See* ***id.*** Failure to provide the citations to those parts of the record necessary to support her argument precludes review. *See* ***id.***

6. Learned Treatise

Sadowsky argues that the trial court erroneously denied admission of a learned treatise offered on redirect to bolster her expert witness's credibility. Her expert, William McKinnery, Jr., a certified industrial hygienist and professional engineer, testified on redirect that there were only two or three articles about asbestos fiber release from either gasket installation or removal or packing materials being installed or removed, and that all found that fibers were released when the gasket or packing material was installed or removed.

Sadowsky next inquired whether the articles found that the amount of fibers released were greater than to the degree of a thousandth. Objection to this question was sustained on hearsay grounds. Sadowsky next attempted to introduce an article, stating: "Your Honor, counsel opened the door [on cross] and if this is something he [McKinnery] is familiar with and relies upon as an industrial hygienist, I will lay the proper foundation." Defense counsel again objected on the ground that the article was not introduced on direct. After a sidebar conference, the trial court sustained the objection.

Sadowsky argues that the trial court erroneously denied the introduction of the article as a learned treatise, under § 908.03(18), STATS. She further contends that even if hearsay, it is admissible for the limited purpose of serving as a basis for the expert witness's opinion, and bolsters the expert's credibility. *See* ***Kolpin v. Pioneer Power & Light Co.,*** 162 Wis.2d 1, 37, 469 N.W.2d 595, 609-10 (1991).

Again, we are troubled by the lack of record upon which to make our review. Here, the sidebar conference was unrecorded. Because Sadowsky failed to preserve her claim of error, we do not overturn the trial court's discretionary determination. ***McClelland,*** 84 Wis.2d at 153, 267 N.W.2d at 847.

Also, from the scanty record before us, it does not appear that the objection to the article was sustained on hearsay grounds, but rather because the article went beyond the scope of cross-examination. Because the trial court may sustain objections on redirect to questions beyond the scope of cross, *see* ***State v. Cydzik,*** 60 Wis.2d 683, 690 n.10, 211 N.W.2d 421, 426 n.10 (1973), Sadowsky must identify those portions of the cross-examination that pertain to her re-direct examination.

However, Sadowsky only identifies portions of the cross-examination of McKinnery, wherein defense counsel "attacked Mr. McKinnery's credibility." Sadowsky argues that the article bolstered credibility by serving as a basis for opinion testimony. The appropriate purpose of cross-examination is to test credibility. ***McClelland,*** 84 Wis.2d at 156-57, 267 N.W.2d at 848. The article was not brought up on direct examination or on cross-examination. A credibility challenge does not abdicate the principle that redirect may be limited to the scope of cross. The trial court is entitled to control the manner and mode of presentation of evidence. Sections 906.11(1) and (2), STATS.

In addition, although § 907.03, STATS., permits an expert to testify to the bases of his opinion, even if hearsay, a necessary foundation must be laid. The record fails to reveal foundation testimony.

7. Transcript of Dr. Gerrit Schepers' Testimony

Sadowsky argues that the trial court erroneously denied the introduction of a transcript of Schepers' testimony, because Sadowsky demonstrated that the witness was unavailable and she demonstrated due diligence in attempts to procure his attendance at trial pursuant to § 908.04(1)(e), STATS. In support of her argument, Sadowsky cites only to exhibits 87 and 261. Exhibit 87 is a transcript of Schepers' testimony in a 1990 case in Monongalia County, West Virginia. Exhibit 261 is a piece of notebook paper entitled "Schepper's [sic] Rebuttal" containing numbers presumably referring to pages of the transcript.

Sadowsky does not cite to the trial court's ruling. This record citation is inadequate to allow review of the trial court's discretionary decision. Because Sadowsky does not identify where in the several thousand page record she made her offer of proof, she has not adequately preserved her claim of error. Sections 809.19(1)(e) and 901.03(1), STATS.

8. Threshold Limit Value, Maximum Allowable Concentrations and Permissible Exposure Limits

Next, Sadowsky argues that the trial court erroneously exercised its discretion by admitting threshold limit value, maximum allowable concentrations and permissible exposure limits as evidence of the standard of care and state of the art. OCF sought to introduce deposition testimony, taken between 1980 and 1990, of three individuals who were deceased at the time of trial. Sadowsky objected on several grounds: (1) There was no showing the persons were unavailable; (2) Sadowsky was not a party to the 1985 litigation; (3) the depositions were taken from fact witnesses and now they were to be introduced as expert testimony; (4) the 1985 case dealt with a different product than here; (5) the depositions were taken before Sadowsky's counsel became involved with asbestos litigation; and (6) because Schepers' deposition testimony was not permitted, it would be applying a double standard to permit this deposition testimony.

The trial court stated that it did not recall why Schepers' testimony was not permitted. It accepted opposing counsel's representation as an officer of the court that the three individuals were deceased. It ruled that under § 908.045, STATS., the deposition testimony was admissible. Section 908.045 provides:

> **Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> **(1)** FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Because the record indicates that the witnesses were deceased and the deposition testimony was taken in a personal injury asbestos proceeding in

compliance with law against a party with an opportunity to examine the witness with a motive and interest similar to those against whom the testimony was offered, the trial court correctly applied § 908.045, STATS.

Sadowsky now argues, however, that the evidence showing respondents' reasonable beliefs and state of the art is not relevant. She contends that we should follow the Maryland Court of Appeals that excludes such evidence when the plaintiff introduced defendant's actual knowledge of the hazards of asbestos, citing "***ACandS, Inc. v. Asner,*** 104 Md.App. 608, 394-396 [sic] (Ct. App. 1995)." Our review of the portion of the record cited by Sadowsky reveals no objection based on relevancy. We will not reverse based upon grounds not made to the trial court. Section 901.03(1)(a), STATS.

9. OCF's Answers to Sadowsky's Interrogatories

Next, Sadowsky argues that the trial court erroneously exercised its discretion when it permitted certain interrogatory answers to be read, yet failed to allow Sadowsky to read pertinent answers dealing with the same subject. Sadowsky states: "Appellants have searched for transcripts of such rulings but have been unable to find any." It is the appellant's burden to obtain transcripts of the portions of the record upon which claim of error is based. Section 809.16, STATS. Failure to do so precludes review. ***In re Ryde,*** 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977).

10. Unavailable Witness Testimony

Sadowsky argues that the trial court erroneously exercised its discretion by allowing the deposition testimony of the three witnesses, who opposing counsel claimed were deceased. Sadowsky contends that opposing counsel did not submit evidence of a good faith attempt to secure the physical presence of the witnesses. We concluded in our previous discussion of this issue that it was within the trial court's discretion to accept opposing counsel's representation as officer of the court that the witnesses were deceased. As the trial court stated, if counsel was not telling the truth, "of course he knows what the ramifications of that are."

11. Carl Mangold's Testimony

Sadowsky argues that the trial court erroneously exercised its discretion when it admitted Carl Mangold's testimony concerning unscientific studies concerning asbestos fiber. Citing ***Daubert v. Merrell Dow Pharmaceuticals, Inc.,*** 509 U.S. 579 (1993), Sadowsky essentially argues that Mangold's testimony was unreliable. Analogous ***Daubert*** based argument has previously been rejected in Wisconsin. *Cf.* ***State v. Peters,*** 192 Wis.2d 674, 690, 534 N.W.2d 867, 873 (Ct. App. 1995) ("our standard for the admission of scientific evidence was unaffected by ***Daubert***."). Also, because she does not provide a record cite to the trial court's ruling, the court's discretionary determination will not be reviewed.

Sadowsky also argues that the trial court improperly limited cross-examination of Mangold. Because she provides no cite to the trial court's ruling, we do not review this issue.

12. Failure to Warn

Next, Sadowsky argues that the trial court erred when it precluded evidence and argument that Anchor and Garlock were negligent for failing to warn that their products contained asbestos which was dangerous when their products were used in a reasonably foreseeable and expected manner. She contends that by limiting her cross of Dr. Robert Sawyer, the trial court prevented her from showing that a lack of warning was the cause of Sadowsky's excessive exposure to asbestos.

Sadowsky's cite to the record, R161:140, does not exist. Record cite R161 is a two-page affidavit of plaintiff's attorney relating to a procedural matter. We located the transcript of Sawyer's testimony at R283, a document of 161 pages. Sadowsky's cross examination starts at 283:84 and ends at 283:141. On the last page of cross-examination, Sadowsky asked:

Q. Do you believe it would have been prudent to warn such a worker of the possibility that he was going to be

> exposed to asbestos fibers when he installed the Garlock gasket?

The trial court sustained the objection to this question, and Sadowsky requested to approach the bench. The trial court asked, "On this issue?" and Sadowsky replied, "No. I know the Court's rulings hold." An unrecorded sidebar conference was held, and Sadowsky's attorney then stated that he was done. Because Sadowsky has failed to preserve this effort for appellate review, we do not review her claim of error. Section 901.03(1)(b), STATS.

13. Punitive Damages

Because the trial court awarded no compensatory damages, we do not reach the issue of punitive damages.

COSTS

At this juncture, it is painfully apparent that in a record of this volume, the need for careful record citation cannot be overstated. This requirement is found not only in the rules of appellate briefing, § 809.19, STATS., but also in several cases, *see* ***Tam,*** 154 Wis.2d at 291 n.5, 453 N.W.2d at 162 n.5; ***Keplin,*** 24 Wis.2d at 324, 129 N.W.2d at 323. Here, Sadowsky failed to include record citations to the trial court's reasoning in her first appellant's brief, and failed to ensure that the transcripts of the court's rulings were included in the record. This was her burden. Section 809.16, STATS.

After this inadequacy was pointed out in the respondents' brief, the appellant moved to supplement the record and file a twenty-page reply brief, instead of a maximum of thirteen pages as provided in § 809.19(8)(c)2, STATS. We granted the motion and granted the respondents' request to file an additional response brief to comment on the transcript citations the appellant made for the first time in her reply brief. We did not rule at that time on the respondents' request for motion costs and do so now.

Pursuant to our discretionary authority under § 809.83(2), STATS., we award the respondents costs on appeal and motion costs. As a penalty against the appellant's counsel, we order appellant's counsel to pay the sum of $150 to each of the two respondent law firms as additional costs for preparing second response briefs.

By the Court.—Order and judgment affirmed. Costs to the respondents.

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