COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2888 **Cir. Ct. No. 01CV007772**

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

PETER JONCAS, DENISE JONCAS, AND BRITTANY JONCAS,

PLAINTIFFS-RESPONDENTS,

V.

ERIE MANUFACTURING CO., D/B/A ERIE MEDICAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Erie Manufacturing Co. appeals from a judgment entered after a jury found it was 40% causally negligent for injuries the Joncases suffered when a portable oxygen unit burst into flames. Erie claims: (1) the trial court should have ruled as a matter of law that Allied Healthcare was responsible

for the Joncases' injuries instead of allowing the question to be answered by the jury; (2) the trial court should have barred testimony that Erie's post valve on the oxygen unit was defective or unreasonably dangerous; (3) there was insufficient evidence for the jury to find the post valve was defective; (4) Barry Newton's (the Joncases' expert witness) experimental tests should have been excluded from evidence; (5) the trial court erroneously exercised its discretion in instructing the jury that Erie had a "duty to warn" users of its product; (6) Erie was a component manufacturer and therefore did not have a duty to warn; (7) the evidence is insufficient to establish a cause between the post valve design, manufacture or assembly and the accident; (8) the damage awards were excessive; and (9) the trial court erred in excluding evidence that Allied was once a party to the action and settled its claims with the Joncases. Because we resolve each contention in favor of upholding the verdict, we affirm.

I. BACKGROUND

¶2 On January 20, 1999, Peter Joncas was a firefighter with the City of Oak Creek Fire Department. Joncas was performing a routine check of a portable oxygen tank apparatus, which was equipped with an LSP regulator, manufactured by Allied, and a post valve, manufactured by Erie. Joncas "cracked" the cylinder valve in order to test the pressure in the cylinder and was immediately overcome by a fireball. He suffered second-degree burns over 15% of his body, primarily affecting his arms and face. He was hospitalized at the St. Mary's Hospital Burn Unit until February 9, 1999.

¶3 Joncas, his wife Denise, and his daughter Brittany sued Allied, the manufacturer of the regulator, and Erie, the manufacturer of the post valve. The Joncases alleged strict liability and negligence claims against both companies. In

May 2003, the parties attended mediation, at which Allied agreed to settle with the Joncases in exchange for a ***Pierringer***[1] release. Allied was dismissed from the case as a result of the settlement, and the court amended the caption to remove Allied and ordered that no reference be made regarding Allied's prior status as a party or to its settlement agreement.

¶4 Trial was set for July 14, 2003. On June 2, 2003, Erie filed a motion seeking summary judgment. The trial court denied the motion on two grounds: it was untimely filed and issues of material fact existed as to Erie's liability. The case was tried to a jury. At the conclusion of the two-week trial, the jury returned a verdict finding both Allied and Erie causally negligent. The jury apportioned negligence between the two with Allied being 60% responsible and Erie being 40% responsible. The jury also set damages as follows: $75,000 for future loss of earning capacity; $1,000,000 for past pain, suffering, disability and disfigurement; $250,000 for future pain, suffering, disability and disfigurement; $100,000 for Denise Joncas's past and future loss of society and companionship; and $15,000 for Brittany Joncas's past and future loss of society and companionship.

¶5 Erie filed post-verdict motions, which were all denied. Judgment was entered. Erie now appeals.

[1] *See* ***Pierringer v. Hoger***, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

II. DISCUSSION

A. Verdict Questions—Allied's Negligence.

¶6 Erie argues that the trial court should have ruled as a matter of law that Allied was causally negligent instead of allowing that issue to go to the jury. It contends that because all the experts testified that Allied's regulator was defective, the trial court should have answered the verdict questions relating to Allied's causal negligence instead of allowing this issue to go to the jury. We reject this argument.

¶7 First, even if all of the experts testified as to Allied's negligence, a jury is not bound to accept the testimony of the experts. *See* ***Fehrman v. Smirl***, 20 Wis. 2d 1, 15-16, 121 N.W.2d 255 (1963). The jury could have determined that the experts' testimony was not credible.

¶8 Second, Erie has failed to cite any authority to support its proposition that it is entitled to a new trial on the basis that the jury, rather than the trial court, found Allied causally negligent. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

B. Motion in Limine.

¶9 Erie argues that the trial court erred when it denied its motion *in limine* seeking to bar testimony that its post valve was defective or unreasonably dangerous. It bases its contention on its belief that prior to trial, all of the expert liability witnesses agreed that the post valve was not unreasonably dangerous in design or manufacture. We are not persuaded.

¶10 The record clearly reflects that Barry Newton opined that the design of the post valve was defective and unreasonably dangerous. This evidence is contained both within his June 28, 2002 report and his discovery depositions. The fact that Newton allegedly equivocated as to his opinions does not remove this issue from the jury. Rather, the equivocation provided Erie with the opportunity to argue to the jury that its valve was not defective; however, the equivocation does not operate, as a matter of law, to remove the issue from the jury. The jury's function was to assess whether to accept or reject Newton's equivocation. *See* ***Weber v. White***, 2004 WI 63, 272 Wis. 2d 121, 681 N.W.2d 137.

C. Insufficient Evidence.

¶11 Erie contends there was insufficient evidence to support the jury's verdict finding that Erie's post valve was defective. Erie argues the only evidence of negligence was that the valve could have "possibly" been designed in another way. We are not persuaded.

¶12 In reviewing a claim that the evidence was insufficient to sustain the verdict, we apply the following standard of review. We will not overturn the jury's finding if there is any credible evidence to support the verdict, especially when the verdict has been approved by the trial court. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶¶39-40, 235 Wis. 2d 325, 611 N.W.2d 659.

¶13 Erie argues that the only evidence against it was that the post valve was not the "best possible design" and citing ***Greiten v. La Dow***, 70 Wis. 2d 589, 602, 235 N.W.2d 677 (1975) ("It is boiler-plate law that, merely because a product … is not as safe as possible, because there are better methods of manufacture … does not lead to the conclusion that the method employed was undertaken with a lack of ordinary care or the product was defective[]") (quoting Heffernan, J.,

concurring), suggests on this basis that the jury's verdict should be overturned. Erie also devotes substantial argument to the fact that the Allied regulator and not the post valve should bear the entire blame. It points out that its post valve has been involved in only two fires, both times involving an Allied regulator. It also emphasizes that there have been no fires reported involving an Erie post valve when used with non-Allied regulators.

¶14 Our review of the record demonstrates that there was credible evidence to support the jury's finding that the post valve was defective. There was expert testimony that Erie was negligent in the design of the post valve and that the valve was defective and unreasonably dangerous. There was expert testimony that Erie did not exercise ordinary care in designing the valve, that the design was defective, and that the valve was unsafe for normal use. There was testimony that although the post valve conformed with certain 1994 standards, these standards were promulgated by a self-regulating body and considered minimum standards. There was testimony that Erie should have followed the American Society of Testing and Materials standards and National Aeronautics and Space Administration guidelines. Erie's own expert, Larry Hansen, acknowledged that the post valve failed to conform to ASTM's specific recommendations regarding auto ignition temperature, heat of combustion, and oxygen indices.

¶15 Moreover, as noted by the trial court, the fact that Erie's post valve was only involved in two documented fires and both were with Allied regulators does not absolve Erie of liability. The testimony at trial indicated that the fire started in the post valve, that the seat seal and chrome plating of the post valve were defective, and that if the post valve had not ignited, the Allied regulator would not have burst into flames. Evidence was proffered that the Erie post valve's use of a rotating plug together with the seat material selection caused the

ignition of the fire. There was sufficient credible evidence to uphold the jury's determination that Erie was negligent.

D. Newton's Pre-Trial Tests.

¶16 Erie claims the trial court erroneously exercised its discretion in allowing into evidence Barry Newton's life cycle and auto ignition tests. Erie argues that the testing was irrelevant, lacking in probative value, and prejudicial. The Joncases respond that the evidence was properly admitted and that Erie waived its right to raise this issue. Our review on this issue is limited to determining whether the trial court erroneously exercised its discretion. If the trial court considered the proper facts, applied the correct law and reached a reasonable determination, we will affirm the evidentiary admission. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶17 Erie argues that the Newton tests were irrelevant because they did not replicate the conditions present at the Joncas incident. The Joncases respond that the controlled testing was performed to determine whether the post valve seat alone would propagate a fire within the regulator. The Joncases also argue that Erie waived its right to raise this issue on appeal because it did not object at the time the evidence was admitted at trial and did not raise this issue in its postverdict motion. As a result, citing ***Roach v. Keane***, 73 Wis. 2d 524, 535-36, 243 N.W.2d 508 (1976), the Joncases contend that Erie failed to preserve this issue for appellate review.

¶18 Erie fails to respond to the waiver argument in its reply brief. Accordingly, it concedes that it failed to preserve this issue for review and we decline to address it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs., Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

E. Duty to Warn Instruction.

¶19 Erie next contends the trial court erred in instructing the jury on its "duty to warn." It argues that the Joncases failed to present any evidence demonstrating that Erie had a duty to warn and, therefore, the instruction should not have been given. The Joncases respond that the record did in fact contain the necessary evidence to support the instruction.

¶20 Our review on a jury instruction issue is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Vick***, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). The trial court has wide discretion in deciding which instructions to give; however, there must be both a legal and factual basis in order to instruct the jury on a particular issue. ***Vogel v. Grant-Lafayette Elec. Coop.***, 201 Wis. 2d 416, 429, 548 N.W.2d 829 (1996).

¶21 We conclude that there was both a legal and factual basis to support the trial court's "duty to warn" instruction. When the manufacturer knows about a risk and the average consumer might not reasonably anticipate the risk, the manufacturer has a duty to warn. *See* ***DeSantis v. Parker Feeders, Inc.***, 547 F.2d 357, 363 (7th Cir. 1976).

¶22 Here, there was testimony from both Barry Newton and Larry Hansen about the dangers associated with the post valve, including the fact that the post valve could ignite and start a fire simply by opening it. There is no dispute that the average consumer would not know this. Further, it is undisputed that Erie never issued any warnings in accompaniment with its post valve. This evidence was sufficient to uphold the trial court's decision to give the duty to warn instruction.

¶23 Erie contends that there was no expert testimony on this issue and, therefore, the instruction should not have been given. The squabble seems to be over the fact that Newton testified that certain "information" should have been provided to users, instead of using the specific word "warning." We do not find the distinction between the two words to be significant. There was expert testimony regarding the need for Erie to provide information to the users as to the dangers associated with the product. This was sufficient to sustain the trial court's discretionary decision.

F. Component Part.

¶24 Erie also contends that its post valve was a component part of a larger system and, therefore, it had no duty to warn. *See* ***Pomplun v. Rockwell Int'l Corp.***, 203 Wis. 2d 303, 307-08, 552 N.W.2d 632 (Ct. App. 1996). It contends that if it had not been attached to the aluminum regulator, no injury would have occurred. We are not persuaded.

¶25 The post valve is designed to be used with any regulator and, in fact, during refill operations, the post valve is used without any regulator attached to it. The post valve was not a part another manufacturer used to construct a larger, complicated machine. Erie knew exactly how its product would function in conjunction with the regulator.

¶26 Also, even without the aluminum regulator attached to it, the defects in the rotating plug and the use of the more flammable chrome plating material have the potential to ignite and cause harm. Erie knew that its design had these potential flaws that could cause ignition, particularly after the post valve had deteriorated over time. Erie knew the dangers of attaching the post valve to an aluminum regulator because it had declined to use aluminum in its own regulators.

Erie knew that it was providing its product to companies who were attaching it to aluminum regulators. It could have included with each post valve a warning and recommendations as to checking on deterioration.

¶27 Based on the foregoing, we cannot conclude that the post valve was a component part, thereby absolving Erie of any and all duties to warn users as to the dangers associated with its product and the steps one could take to avoid those dangers.

G. Causal Connection.

¶28 Erie next argues that there is no evidence that its post valve was a substantial factor in causing the fire that occurred in this case. We are not persuaded.

¶29 Although we can understand Erie's persistence in attempting to place 100% of the blame on Allied, the jury found otherwise and there is evidence to support the jury's verdict. Barry Newton unequivocally identified the post valve seat as the *origin* of the Joncas fire and testified that the fire started there because of the defects in the valve's design and Erie's negligence. In other words, the jury heard that the fire started in the post valve. It could logically infer, then, that if the post valve would not have ignited, the regulator would not have ignited and there would have been no injury. Based on this testimony, there is a clear causal basis connecting the post valve to the fire.

H. Damages.

¶30 Erie next challenges the damages awarded by the jury as excessive and against the greater weight of the evidence. We are not persuaded.

¶31 The amount of damages awarded is generally within the jury's discretion. ***Zintek v. Perchik***, 163 Wis. 2d 439, 480, 471 N.W.2d 522 (Ct. App. 1991), *overruled in part on other grounds*, ***Steinberg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). "If there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, especially where the verdict has the approval of the trial court, [we] will not disturb the finding unless the award shocks the judicial conscience." ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 446, 405 N.W.2d 354 (Ct. App. 1987). A damage award is excessive if it reflects a rate of compensation beyond all reason, ***Peissig v. Wisconsin Gas Co.***, 155 Wis. 2d 686, 703, 456 N.W.2d 348 (1990), or is based on pure speculation and conjecture, ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979).

¶32 Erie first challenges the $1,000,000 award for Joncas's past pain, suffering, disability and disfigurement. Its argument is that this award exceeded his counsel's suggested range of $500,000 to $750,000. However, Erie does not cite any authority suggesting that the jury is limited to awarding the range suggested by counsel in closing argument. In fact, the opposite is true. The jury is instructed that the arguments of counsel are not evidence and do not limit or determine the jury's judgment as to what are appropriate damages. *See* WIS JI—CIVIL 1700. There was sufficient factual evidence documenting the past pain, suffering, disability and disfigurement sustained by Joncas to support the jury's award.

¶33 Next, Erie challenges the $250,000 award to Joncas for future pain and suffering. It contends that Joncas's prognosis is good and therefore this award was speculative. We cannot conclude that this award was speculative or excessive. The record reflects that Joncas has permanent scarring on his arms, he

has lost 30% functioning in each arm, he suffers irritation and numbness, continues to suffer from post-traumatic stress disorder, and cannot perform his normal duties as a firefighter. The jury had a factual basis to award the damages here.

¶34 Next, Erie argues that the $75,000 award for Joncas's loss of future earning capacity was excessive and against the great weight of the evidence. It bases this argument on the fact that Joncas is again working for the Oak Creek Fire Department and the Air Force Reserves, as he had been prior to the accident. We are not persuaded. The jury awarded the *exact* amount that Erie's counsel advised the jury would be an appropriate figure. Moreover, the award was consistent with Wisconsin case law regarding the nature of a claim for loss of earning capacity. *See* ***Krause v. Milwaukee Mut. Ins. Co.***, 44 Wis. 2d 590, 617, 172 N.W.2d 181 (1969) ("… [the] jury could reasonably infer that the benevolence of plaintiff's employer would not continue until retirement and he would suffer a loss in wages due to the injuries received in the accident[]"). The jury here heard evidence that Joncas was concerned about whether he would retain his job as a firefighter, given his limitations. Thus, this award was not excessive or against the great weight of the evidence.

¶35 Erie's final complaint on damages is that the $100,000 awarded to Denise Joncas for loss of society and companionship was excessive. It argues that Denise and her husband had a strong marriage before, during and after this incident and therefore, the award was an "emotional response on the part of the jury." We disagree.

¶36 The jury heard medical testimony as to the impact that burns of the nature suffered by Joncas have on a patient's spouse. The jury heard that Denise

was unable to hold or physically comfort her husband while he was in the hospital and that they were unable to enjoy a normal physical relationship for long periods of time following the injury and the subsequent medical treatment. Testimony also demonstrated the extensive care and assistance Denise provided to her husband when he came home from the initial hospitalization and the later two surgeries. The jury was told that it could consider the stress, worry and anxiety Denise suffered and will continue to suffer due to the injuries, both physical and psychological. There was a clear basis in the record for the jury's award to Denise.

I. Settlement.

¶37 Erie's final contention is that the trial court erred in excluding from evidence the fact that Allied was originally a party defendant, but settled with the Joncases prior to trial. We reject this contention.

¶38 The trial court's decision was based on two cases: ***Morden***, 2000 WI 51, ¶¶80-85 and ***Anderson v. Alfa-Laval Agric., Inc.***, 209 Wis. 2d 337, 349-52, 564 N.W.2d 788 (Ct. App. 1997). The law in these cases indicates that evidence of a prior defendant's settlement with a plaintiff is generally inadmissible unless a witness has changed his or her testimony. Another basis for the trial court's ruling was concern that disclosure of the Allied settlement might prejudice Erie—by suggesting that it should also have come forward and accepted responsibility for the Joncases' injuries.

¶39 The trial court's decision was reasonable and based on pertinent law. The decision did not prevent Erie from attempting to convince the jury that Allied was solely responsible for the incident. Erie was provided every opportunity to

place the entire blame on Allied. Therefore, the trial court did not err on this issue.

By the Court.—Judgment affirmed.

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