COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1477 **Cir. Ct. No. 2002CV400**

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

JOSHUA L. GENSKOW,

PLAINTIFF-APPELLANT,

V.

JAMES A. KURSZEWSKI AND SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Joshua Genskow appeals a judgment dismissing his personal injury claim against James Kurszewski and Kurszewski's insurer. Genskow was injured while employed on Kurszewski's farm. The jury found Kurszewski causally negligent, but assigned a greater percentage of causal

negligence to Genskow. He contends that the trial court erroneously declined to set aside the negligence finding as grossly disproportionate, either on the facts or as a matter of law, to set aside the verdict for prejudicial remarks by Kurszewski's attorney during closing arguments, and to deny a new trial in the interest of justice. Genskow also asks this court to order a new trial in the interest of justice. We affirm.

¶2 Genskow worked part time on Kurszewski's dairy farm. He was injured after Kurszewski directed him to clean inside a barn, and left him alone to do it. Four cows were inside the barn when Genskow arrived, and a bull was in an outside pen. Genskow entered the barn and attempted to herd the animals through a door to the outside pen before he began his cleaning chore. One of the animals bolted and ran back into the barn. Genskow turned to pursue it and, as he did, the bull entered the barn and attacked him from behind, causing severe injuries.

¶3 Genskow argued to the jury that Kurszewski was negligent by either failing to remove the bull from the farm earlier or failing to take adequate steps to protect Genskow from the threat it posed. The jury heard expert testimony that the bull should have been removed from the farm earlier because of its size and aggressiveness and that one person alone should not perform farm chores around a large, aggressive bull. There was also evidence that Kurszewski knew the bull had previously acted aggressively toward people, and was concerned about it.

¶4 Kurszewski contended that Genskow was contributorily negligent. The jury heard testimony that Genskow had experience working around bulls, and knew to "watch out for them." He was familiar with the bull that attacked him, and had frequently cleaned the barn. There was also testimony that Genskow

knew the bull might enter the barn but did not keep his eye on the entry door or attempt to close it before turning his back to it.

¶5 In closing arguments Kurszewski's counsel made the following comments:

> You know, I have a trampoline in my back yard, and I never thought I would put a trampoline in my back yard until I had a boy that—frankly, I'd rather have him out on the trampoline than jumping around in the house. My neighbors think I'm crazy to have a trampoline in my back yard; that I should get waivers from all neighbors before I let my kids have friends over to be on the trampoline.
>
> I recognize that a trampoline presents a danger. I recognize that a trampoline also presents something else; fun for my kid. But if my son gets hurt on that trampoline, I will guaranty you that if you asked me in a deposition when a lawyer is asking the questions I'll say, 'You know, I wish I'd gotten rid of that trampoline a month earlier.'
>
> Nobody wants somebody to get hurt. All that is is a recognition that yes, he got hurt. But just like I would say, 'Yeah, I should have gotten rid of that trampoline a month earlier,' 'I should have gotten rid of the bull a month earlier,' he's talking to his neighbor, the father. He's a man he's known forever. Do you think he wants to say to him, 'No, I shouldn't have gotten rid of that bull'? Of course he's going to say that. He's a nice, caring man.

Counsel also made an argument regarding damages to which Genskow objected.

¶6 The jury returned a verdict finding Genskow sixty-five percent causally negligent, and Kurszewski thirty-five percent causally negligent. The trial court denied Genskow's motion for a new trial based on a disproportionate verdict. The court also rejected Genskow's argument that he was entitled to a new trial because of counsel's trampoline argument.

¶7 A jury's apportionment of negligence will be sustained if there is any credible evidence which supports the verdict and sufficiently removes the

question from the realm of conjecture. ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 134, 403 N.W.2d 747 (1987). We will set aside the apportionment if it is grossly disproportionate, given the facts, or there was such a complete failure of proof that the verdict is necessarily speculative. ***Lautenschlager v. Hamburg***, 41 Wis. 2d 623, 628, 165 N.W.2d 129 (1969).

¶8 Credible evidence supported the jury's apportionment of negligence. It was undisputed that Genskow knew the potential hazard of working around a bull, and had a clear opportunity to avert the attack simply by closing the door through which the bull entered the barn. A reasonable jury could infer that failing to do so was negligent. Additionally, there was evidence from which a reasonable jury could infer that Genskow failed to keep a proper lookout for the bull, and could have averted the attack but for that negligence even after the bull entered the barn. In contrast to the essentially undisputed evidence of Genskow's negligence, the evidence of Kurszewski's negligence, whether in keeping the bull, or failing to adequately warn and assist Genskow, was disputed. While Genskow argues that Kurszewski must be held more negligent than he as a matter of law, the extent of Kurszewski's negligence, or whether he was negligent at all, was a decision the jury could make only after assessing the weight and credibility of the testimony. Matters of weight and credibility are left to the jury, and where more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the jury. ***Frayer v. Lovell***, 190 Wis. 2d 794, 810, 529 N.W.2d 236 (Ct. App. 1995). The jury could have reasonably found Kurszewski negligent, but less so than Genskow.

¶9 In addition to arguing the facts, Genskow seemingly contends that Kurszewski must be held more negligent as a matter of law because when an employer maintains an inherently dangerous workplace, such as a dairy barn with

a bull present, the employer can never be less negligent than an employee injured in that workplace. In support he cites cases in which employees have recovered from employers despite voluntarily undertaking risky employment tasks. However, none of these cases set forth a general rule of liability that necessarily applies in these situations. Each case was resolved on its particular facts, as the jury resolved this case on its particular facts. A jury's apportionment of negligence between employer and employee, even one placed in a risky situation by the employer, remains a question of fact, not law.

¶10 The trial court reasonably concluded that counsel's closing argument did not warrant a new trial. Attorneys are entitled to reasonable latitude in argument and when commenting on the evidence. ***Affett v. Milwaukee & Suburban Transp. Corp.***, 11 Wis. 2d 604, 613, 106 N.W.2d 274 (1960). The decision whether to grant a new trial for an attorney's prejudicial remarks is discretionary. ***Wagner v. American Family Mut. Ins. Co***., 65 Wis. 2d 243, 249, 222 N.W.2d 652 (1974). To reverse the trial court, we must be convinced that the result would probably have differed but for the improper comments. ***Id.*** at 250. Here, counsel did not, as Genskow contends, inappropriately question the motives of personal injury plaintiffs. The passage he cites, quoted above, simply does not support that contention. It was a reasonable and fair means of addressing testimony that Kurszewski expressed after-the-fact regret about keeping the bull. In any event, Genskow waived the issue by failing to timely object to the argument. *See* ***Hubbard v. Mathis***, 53 Wis. 2d 306, 307, 193 N.W.2d 15 (1972) (improper remarks in closing arguments cannot be a basis for a new trial motion or an appeal without timely objection). As for counsel's arguments on damages, we need not review their propriety because we are affirming the jury's apportionment of negligence.

¶11 We decline to reverse the trial court's decision on Genskow's motion for a new trial in the interest of justice, or to grant a new trial using our discretionary authority under WIS. STAT. § 752.35 (2003-04). Genskow's arguments for relief in the interest of justice are identical to the claims of trial court error we have already rejected as grounds for a new trial.

By the Court.—Judgment affirmed.

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