COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP482 **Cir. Ct. No. 2003CV516**

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

KENNETH M. GRABSKE, JR. AND MARY L. GRABSKE,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

ZURICH AMERICAN INSURANCE COMPANY,

PLAINTIFF,

V.

INTEGRITY MUTUAL INSURANCE COMPANY, CORPORATE CONSTRUCTION, LTD. AND LEWIS CONSTRUCTION, INC.,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,

REGENT INSURANCE COMPANY,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed as modified; cross-appeal reversed and cause remanded with directions.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 ANDERSON, P.J. Kenneth M. Grabske, Jr., sustained an injury while working on a construction job site. He and his wife, Mary L. Grabske, sued Integrity Mutual Insurance Company, Corporate Construction, Ltd., Lewis Construction, Inc., and Regent Insurance Company alleging negligence, negligence per se, and violation of the safe place statute under the doctrine of *respondeat superior*. The jury returned a special verdict. Integrity Mutual, Corporate Construction and Lewis Construction appeal. The Grabske's cross-appeal. We affirm on the appeal and reverse on the cross-appeal.

Appeal[1]

¶2 This case arises out of an incident on October 8, 2002, during the construction of the Super Wal-Mart in Delavan, Wisconsin. Kenneth Grabske was

[1] We start with a housekeeping issue. We disagree with Attorney James C. Ratzel's statement in the appellants' brief that "the underlying facts are … not relevant with regard to this appeal." Noting the facts are not in dispute, Ratzel gives only a scant recitation of the facts. This scant recitation of the facts is a violation of appellate rules because Ratzel is incorrect in his belief that the underlying facts are irrelevant. We thus, advise Ratzel to review the rules of appellate procedure and to make special note that it is a violation of WIS. STAT. RULE 809.19(1)(d) (2005-06) to not provide this court with a full recitation of the relevant facts with proper citation to the record. This is so whether the facts are in dispute or not. This court is not required to sift through the record for facts. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). We nonetheless did just that and so hold the appellants to the facts as we have presented them.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the acting plumbing foremen, employed by Advance Mechanical Contractors, which was the plumbing subcontractor on the job. Corporate Construction was the acting general contractor and Lewis Construction was the concrete subcontractor.

¶3 Part of the construction involved installation of an automotive center. Corporate Construction's site trailer was located right outside of the automotive center site. During installation, in order to provide access to the automotive center's oil service pit, a metal stair frame was lowered into the pit by a forklift. Caution tape was then placed across the top of the stairs, but because the stairs were not being used before the concrete was to be poured, no wooden boards were placed into the stair treads as is generally required by Occupational Safety and Health Administration regulations.[2] At some point before Grabske's accident, the caution tape was removed by Lewis Construction. Lewis Construction employees poured the concrete for all but one of the stairs on October 7, 2002. One tread was not poured because a metal tab, used for lowering the stair frame into place, needed to be removed.

¶4 It is unclear as to whether the caution tape was replaced at the top of the stairs after the cement was poured but, according to Grabske, it was not in place at the time of his injury. The foreman for Lewis Construction, Ryan

[2] The Occupational Health and Safety Administration rule states:

> Except during stairway construction, foot traffic is prohibited on stairways with pan stairs where the treads and/or landings are to be filled in with concrete or other material at a later date, unless the stairs are temporarily fitted with wood or other solid material at least to the top edge of each pan. Such temporary treads and landings shall be replaced when worn below the level of the top edge of the pan.

29 C.F.R. § 1926.1052(b)(1) (2008).

Herman, stated that before Grabske's accident, he informed the site superintendent for Corporate Construction, Scott McGinnis, on "at least" two occasions that one of the stair treads leading to the oil service pit was not poured because of the need to first remove the metal tab in the stair tread.

¶5 On October 8, 2002, McGinnis told Grabske to pump standing water out of the oil service pit; at this time the stair tread had still not been poured. Grabske, while on his way to get a pump, walked past the staircase and noticed that the caution tape was "completely removed" so he assumed the stairs were done. Grabske did not see anyone working in the vicinity of the staircase at the time. After retrieving a pump, Grabske returned to the staircase and still did not see anyone in the vicinity. Grabske proceeded down the staircase and, about halfway down, his right foot became stuck in the unfinished stair tread; this caused him to pitch forward and injure his ankle. Grabske sustained a hyper-extension injury of his ankle and required two surgeries as a result.

¶6 The Grabskes sued Integrity Mutual Insurance Company, Corporate Construction, Lewis Construction, and Regent Insurance Company alleging negligence, negligence per se, and violation of the safe place statute under the doctrine of *respondeat superior*. The case was tried to a jury in September 2006. The Grabske's supplied witness John DeRosia, a consulting engineer who testified as an expert in the area of engineering. Over defendant's objection, the court took judicial notice of relevant OSHA regulations. The relevant OSHA regulations prohibit foot traffic on stairways installed on construction sites that have unfinished stair treads if the unfinished stairs are not temporarily filled with wood or other solid material. The court allowed DeRosia to utilize the OSHA regulations insofar as he was allowed to talk about what OSHA required.

¶7 A special verdict form, that was agreed to by the parties, was given to the jury along with jury instructions. On September 13, 2006, the jury returned its verdict finding all parties causally negligent and proportioning liability to the parties with thirteen percent attributed to Corporate Construction, sixty-three percent to Lewis Construction and twenty-four percent to Grabske. The damages on the special verdict were $46,302.81 in medical expenses; $34,220.89 in wage loss; $100,000 in past and future pain and suffering; and $1000 in loss of consortium.

¶8 Both sides filed motions after verdict. The circuit court issued a decision denying all motions on December 21, 2006, and entered judgment on the special verdict. Integrity Mutual, Corporate Construction and Lewis Construction appeal (hereafter Corporate and Lewis). The Grabske's cross-appeal.

¶9 We briefly dispose of the appeal issues before us and then move on to the cross-appeal. First, Corporate and Lewis argue that the verdict as answered is inconsistent on its face, and this warrants a new trial on the issue of liability. They explain their reasoning as follows:

> The issue over the Special Verdict form involves two specific questions that were posed to the jury.
>
> Question 1: "Was the construction site constructed and maintained as safe as the nature of the construction site would reasonably permit on October 8, 2002?"
>
> Question 3: "Was the Defendant, Corporate Construction, Ltd., negligent in failing to construct and maintain the construction site as safe as the nature of the premises reasonably permitted?"
>
> The jury answered "Yes" to both questions. After reviewing the questions it is clear that the jury's answers are inconsistent. The jury's answer to Question 3 directly contradicts its answer to Question 1…. It is logically inconsistent for the jury to find that Corporate Construction

> was negligent in maintaining a construction site that **was** maintained as safely as the nature of the premises would permit. The Defendants simply could not have been negligent if the construction site was **reasonably** maintained.

¶10 Pursuant to WIS. STAT. § 805.13(3) (2005-06), the failure to object at the jury instruction or verdict conferences "constitutes a waiver of any error in the proposed instructions or verdict." *See also* ***LaCombe v. Aurora Med. Group, Inc.***, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532. We have no power to review waived error of this sort. ***Id.***, ¶5.

¶11 Corporate and Lewis argue that it was entirely appropriate for them to raise their objections to the jury's allegedly inconsistent verdict in a postverdict motion because "it is not the verdict that is defective, but the manner in which the jury answered the verdict." Corporate and Lewis claim "the answers were inconsistent, not the verdict." No matter how Corporate and Lewis attempt to characterize their argument, their real complaint is with the *form* of the verdict. They even admit as much in their brief: "The issue over the Special Verdict *form* involves two specific questions that were posed to the jury…. *After reviewing the questions* it is clear that the jury's answers are inconsistent." (Emphasis added.) Corporate and Lewis's failure to object at the jury instruction or verdict conference "constitutes a waiver of any error in the proposed instructions or verdict." *See* WIS. STAT. § 805.13(3); ***LaCombe***, 274 Wis. 2d 771, ¶5. We need not discuss this issue further.

¶12 Corporate and Lewis next argue that the trial court erred by denying their motion for a directed verdict regarding the lack of actual or constructive notice and the lack of an established standard of care by the plaintiffs. A verdict should only be directed against a plaintiff where the plaintiff's evidence, giving it

the most favorable construction it will reasonably bear, is insufficient to sustain a verdict in plaintiff's favor. ***Wallow v. Zupan***, 35 Wis. 2d 195, 198, 150 N.W.2d 329 (1967). Under the safe place statute and under common law, to hold a defendant liable for negligence, he or she must have had actual or constructive notice of the condition. ***Id.*** at 200.

¶13 The jury was instructed on alternative claims of negligence, including claims which required notice and claims which did not. No notice is required in a negligence per se claim (as for a violation of OSHA). A safe-place claim, which is not as specific as the OSHA stairwell regulation, does require constructive notice. ***Bain v. Tielens Constr., Inc.***, 2006 WI App 127, ¶18, 294 Wis. 2d 318, 718 N.W.2d 240. "When a safe place violation is alleged, 'the general rule is that an employer or owner is deemed to have constructive notice of a defect or unsafe condition when that defect or condition has existed a long enough time for a reasonably vigilant owner to discover and repair it.'" ***Id.*** (citations omitted).

¶14 We agree with the trial court that the evidence is sufficient when looked at in a light most favorable to the Grabskes to survive Corporate and Lewis's motion for a directed verdict on any claim of failure to prove notice to Corporate and Lewis of the problem. Lewis's foreman stated that he told Corporate's supervisor at least two times before the incident that one stair had not been poured because of the metal tab remaining in the stair's tread. Corporate's trailer was located right outside of the automotive center. On the day of the incident, Corporate's supervisor told Grabske to pump the standing water out of the oil service pit. It is logical for a jury to infer that Corporate's supervisor had been to the oil service pit that day, in order for him to direct that the water be pumped out of it. We agree with the trial court that "a reasonable jury, in looking

at all of the evidence, including but not limited to the facts listed here, could find that Corporate [Construction] had at least constructive notice of the problem, if not actual notice [and that] Lewis [Construction] had actual notice of the problem, as Lewis left the stairs in the condition Grabske found them in on the day of the incident."

¶15 Corporate and Lewis's final argument is that the trial court erred by allowing admission of the OSHA evidence at trial. Corporate and Lewis have waived this argument as well because they did not object to the court taking judicial notice of the regulation, nor did they object to a copy of it being provided to the jury. In fact, defense counsel stated specifically: "I don't mind the jury having judicial notice of it. The jury can read it …." The defendants' objection dealt with the interpretation of the regulation, but not the judicial notice of it. We normally will not review an issue raised for the first time on appeal. ***Allen v. Allen***, 78 Wis. 2d 263, 270-71, 254 N.W.2d 244 (1977). This is a general rule of judicial administration from which we may depart. ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980). Here, Corporate and Lewis ask us to add an objection to the objection they made before the trial court, one which was never brought to the attention of the trial court as a separate objection. We will not. *See, e.g.*, ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489-90, 339 N.W.2d 333 (Ct. App. 1983). We further note that an expert is not needed in order to properly place the OSHA regulation into evidence because the court is as competent as an expert to make a legal interpretation for the jury.

Cross-Appeal

¶16 Turning to the cross-appeal, the Grabskes contend the trial court erred by refusing to award them interest and costs based upon their statutory

settlement offer. This presents us with a question of law that we review independently. ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶29, 294 Wis. 2d 700, 720 N.W.2d 704. We conclude that the trial court erred in holding that the judgment did not exceed the statutory offer of settlement.

¶17 The relevant cross-appeal facts are as follows. The Grabskes filed two offers of settlement pursuant to WIS. STAT. § 807.01(3) on July 21, 2005, in the amount of $100,000 against each defendant.

¶18 The offer to Lewis Construction provided:[3]

> Pursuant to [WIS. STAT. §] 807.01, plaintiffs, Kenneth and Mary Grabske, by and through their attorneys, Kmiec Law Office, hereby offer to settle the proportionate share of negligence attributable to Integrity Mutual Insurance Company and Lewis Construction, Inc., including the lien of Zurich American Insurance Company, under [WIS. STAT. §] 102.29, for the sum of One Hundred Thousand Dollars ($100,000.00) plus costs.

¶19 On February 15, 2007, judgment was entered in favor of the Grabskes and against Lewis Construction and its insurer, Integrity Mutual Insurance Company, for a total of $142,089.21.[4]

[3] The claims against defendant Corporate Construction were dismissed by the trial court, which is why this portion of our discussion pertains only to Lewis Construction. Under our contributory negligence statute, recovery is barred if the negligence is greater than the negligence of the person against whom recovery is sought. *See* WIS. STAT. § 895.045(1); *see also* WIS. STAT. § 102.29(2). Thus, because Corporate Construction's negligence was found to be 13% and the Grabskes' negligence was found to be 24%, recovery was barred and the trial court properly dismissed the claims for recovery against Corporate Construction. *See* ***id.***

¶20 In motions after verdict, the Grabskes requested an order that they receive double costs and twelve percent interest from the date of the offer of settlement. The defendants objected to the request, specifically asserting that the judgment for plaintiffs will not exceed the statutory offer of settlement because plaintiffs' recovery will be reduced by operation of WIS. STAT. § 102.29, below $100,000.

¶21 In its decision, the trial court agreed with the defendants' position and provided:

> Plaintiffs further request an order for statutory double damages plus 12% interest, stating that their statutory settlement offer of July 21, 2005, was less than what the jury ultimately awarded. Plaintiffs offered to settle for $100,000 against each defendant. However, the Court must apply the formula under [WIS. STAT. §] 102.29, and under those calculations, plaintiffs will recover less than their offer of settlement. They have not received a "more favorable judgment" than what they offered as settlement. Therefore, the Court will not order double damages or interest to the award. (Footnote omitted.)

¶22 We look to the judgment and not the verdict when determining whether plaintiffs' judgment exceeded the offer of settlement. ***Balz***, 294 Wis. 2d

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[4] The Grabske's are entitled to recover damages "diminished in the proportion to the amount of negligence attributed to the person recovering." *See* WIS. STAT. § 895.045 (1); *see also* WIS. STAT. § 102.29(2). The jury awarded $180,523.70 in damages to Mr. Grabske. The jury found Mr. Grabske to be 24% at fault. Thus, by statute, Mr. Grabske's damages are reduced by the 24% of his contributory negligence. *See* ***id.*** He is entitled then to 76% of his damages. Therefore, the correct calculation is $180,523.70 x .76 = $137,198.01. The amount of $142,089.21 reflects the grand total of both Mr. and Mrs. Grabskes' judgments against Lewis Construction including costs and disbursements related to these judgments (i.e., Mr. Grabske's judgment of $137,198.01 plus costs and disbursements related to his judgment taxed in the sum of $4,031.20 plus Mrs. Grabske's judgment of $760 plus costs and disbursements related to her judgment taxed in the sum of $100 = $142,089.21).

700, ¶35. The judgment amounts to a total of $142,089.21, which is well in excess of the Grabskes' offer of $100,000.

¶23 In ***Balz***, we held that the plaintiffs' statutory offer of settlement was not ambiguous because the terms were clearly presented. ***Id.***, ¶34. There, Balz had been seriously injured in an automobile accident. He and his wife filed suit against several parties including their insurers. ***Id.***, ¶3. The Balzes' offer was made based on a theory of *respondeat superior* liability. ***Id.***, ¶34. The offer was within the policy's limits. ***Id.*** Further, the offer clearly stated that the Balzes' would indemnify and hold harmless the defendants for any subrogation claims arising out of the payment of medical and hospital bills. ***Id.*** We affirmed the trial court's decision to refuse to award interest and costs because the judgment was not more favorable than the offer of settlement and credible evidence supported the court's reduction in the jury award for future medical expenses. ***Id.***, ¶35.

¶24 Here, similar to the offer in ***Balz***, the Grabskes' offer indicated that it was offered in exchange for a settlement against Lewis Construction and its insurer, and included the lien of Zurich under WIS. STAT. § 102.29. However, unlike the judgment in ***Balz***, the Grabskes' judgment *was* more favorable than the offer of settlement.

¶25 WISCONSIN STAT. § 807.01 permits a plaintiff to serve a written offer of settlement with costs on a defendant. If the offer is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the taxable costs. Sec. 807.01(3). Further, the plaintiff is entitled to twelve percent annual interest on the recovered amount from the date of the offer of settlement until the judgment is paid. Sec. 807.01(4).

¶26 Providing double costs and interest on rejected settlement offers when a party recovers a more favorable judgment exists to encourage settlement and secure just, speedy and inexpensive determinations of disputes. ***Prosser v. Leuck***, 225 Wis. 2d 126, 140, 592 N.W.2d 178 (1999). The imposition of costs and interest for rejection of statutory settlement offers are punitive. ***Blank v. USAA Prop. & Cas. Ins. Co.***, 200 Wis. 2d 270, 279, 546 N.W.2d 512 (Ct. App. 1996).

¶27 Instead of considering the amount of judgment and comparing it to the offer of settlement as the court in ***Balz*** did, the court reduced the amount that should be compared to the offer of settlement by calculating the Grabskes' net recovery first. The court explained that it was subject to the formula in WIS. STAT. § 102.29[5] and reduced the Grabskes' recovery by their attorney fees and costs and by the amount owed their workers compensation carrier. It then took this net recovery amount, compared it to the settlement offer which was greater than the net recovery, and held that the Grabskes did not recover a more favorable judgment than their offer of settlement. This approach was error. While the court

[5] In personal injury cases where a plaintiff is injured on the job and recovers worker's compensation benefits, any recovery made against a third party is subject to the formula spelled out in WIS. STAT. § 102.29(1), which provides in relevant part:

> After deducting the reasonable cost of collection, one-third of the remainder shall in any event be paid to the injured employee or the employee's personal representative or other person entitled to bring action. Out of the balance remaining, the employer, insurance carrier, or, if applicable, uninsured employers fund shall be reimbursed for all payments made by it, or which it may be obligated to make in the future, under this chapter, except that it shall not be reimbursed for any payments made or to be made under s. 102.18(1)(bp), 102.22, 102.35(3), 102.57, or 102.60. Any balance remaining shall be paid to the employee or the employee's personal representative or other person entitled to bring action.

is subject to the formula in § 102.29, it should not apply it until after it has determined whether a party is due double costs and interests on a rejected settlement offer. In short, the court should have looked to the amount of judgment awarded *before net recovery calculations* and then compared this amount to the offer of settlement.

¶28 If a plaintiff were required to submit offers of settlement by reducing the amount to reflect the individual party's net recovery, the offer would be extremely low in comparison to the true value. If the defendant accepted and paid such an offer, the worker's compensation carrier would apply the formula and the plaintiff would recover less yet.

¶29 We agree with the Grabskes that if this were the case, there would be no reasonable manner that a plaintiff, who had a work-related injury and a third-party claim, could make an offer of settlement under WIS. STAT. § 807.01. The Grabskes' offer of settlement plainly indicated that the offer included the lien interest of Zurich American Insurance Company and, like the offer in ***Balz***, it was not ambiguous. The judgment awarded the Grabskes exceeds the $100,000 offer of settlement and they are entitled to double costs and interest.

¶30 We remand this case in order for judgment to be entered which includes double costs and interest pursuant to WIS. STAT. § 807.01.

By the Court.—Judgment modified and, as modified, affirmed; cross-appeal reversed and cause remanded with directions.

Not recommended for publication in the official reports.