COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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. 2011AP1258 Cir. Ct. No. 2008CV208

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

JANELLE FARMER, GARLAND FARMER, ALEXANDRA FARMER AND TEIYA FARMER,

PLAINTIFFS-APPELLANTS,

PROGRESSIVE CLASSIC INSURANCE COMPANY AND ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

INVOLUNTARY-PLAINTIFFS,

V.

BRUCE KOTARSKI,

DEFENDANT,

RHINELANDER TRANSFER & STORAGE, INC. AND INTEGON NATIONAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Janelle, Garland, Alexandra, and Teiya Farmer (collectively, "the Farmers") appeal a judgment dismissing their negligence claims against Bruce Kotarski, Rhinelander Transfer & Storage, Inc., and Integon National Insurance Company (collectively, "Kotarski"). A jury found Janelle Farmer eighty percent causally negligent for a 2006 auto accident involving the Farmers' vehicle and a semi truck driven by Bruce Kotarski. On appeal, the Farmers assert the circuit court erred by: (1) instructing the jury to disregard evidence of maladjusted brakes on Kotarski's semi; (2) permitting an investigating officer to testify to his opinion that Farmer caused the accident; and (3) concluding their post-verdict motion was untimely and denying their motion to enlarge time. They also assert they are entitled to a new trial based on an improper closing remark by the defense. We affirm.

BACKGROUND

¶2 The Farmers were involved in a motor vehicle accident with Kotarski on December 11, 2006. The evidence at trial showed that Janelle Farmer had entered Highway 51 from a driveway in front of Kotarski's semi. After a short distance, Kotarski moved to the left lane to pass Farmer because she had not accelerated to highway speed. As Kotarski was passing her, Farmer, intending to turn into a driveway across the highway, activated her left turn signal. Farmer then turned into the path of the semi.

¶3 Troopers Thomas Pontbriand and Mark Brandenberg were dispatched to the scene. Pontbriand inspected the semi and discovered that one set of brakes was two inches out of alignment. He issued a citation and ordered the vehicle out of service. Brandenberg reviewed the scene and filed a motor vehicle accident report, which purportedly blamed Janelle Farmer for the accident.[1]

¶4 The Farmers commenced this negligence action against Kotarski. They retained engineer Gerald Inman, who prepared a report on January 27, 2009 finding that Kotarski could have come to a complete stop had he reacted appropriately. Inman acknowledged that the semi's brakes were out of adjustment, yet gave Kotarski "the benefit of the doubt" and assumed the brakes were fully effective.

¶5 Discovery was closed on February 2, 2010, with the trial to begin shortly thereafter. Ultimately, the trial was rescheduled for July 21, 2010. In March 2010, the Farmers retained new trial counsel, who moved to adjourn after discovering that Janelle Farmer was allegedly suffering from a traumatic brain injury. The court granted the motion to adjourn and permitted limited additional discovery on the issue of brain trauma. The trial was rescheduled for January 28, 2011.

¶6 On December 17, 2010, the Farmers sought to amend their complaint to add negligence claims related to the maladjusted brakes. This motion was denied.

[1] The Farmers have not provided a record citation for the accident report. Instead, they rely on Brandenberg's testimony at trial. But Brandenberg was asked for his opinion regarding the cause of the accident and did not specifically mention the accident report in the pertinent testimony.

¶7 Kotarski then filed a motion in limine to exclude evidence of the maladjusted brakes. At some point in January 2011, the Farmers filed an affidavit from Inman purporting to focus exclusively on the condition of the brakes as a cause of the accident. This affidavit does not appear to have been included in the record on appeal.[2]

¶8 The circuit court initially granted Kotarski's motion in limine, finding that the brakes' condition had not been "part of this case in the workup and discovery" and that no expert was able to quantify the degree of brake failure or precisely how it contributed to the Farmers' damages. The court reconsidered its decision shortly before trial. It determined the brakes' maladjustment could not be kept from the jury since both expert reports and the police report mentioned that fact and would likely be introduced into evidence. However, it also determined that, unless Inman could state to a reasonable degree of certainty the extent to which the semi's braking capacity was impaired, the jury would be instructed to disregard the brakes' maladjustment in determining fault. Ultimately, the jury was given such an instruction.

¶9 At trial, the Farmers called Brandenberg as an expert witness on accident scene documentation and light filament analysis. On cross-examination, Brandenberg testified to his opinion that Janelle Farmer had caused the accident. On January 21, 2011, the jury found Janelle Farmer 80% negligent and Kotarski 20% negligent, effectively denying the Farmers any recovery.

[2] The record entry for the affidavit provided by the Farmers does not include the affidavit. The Farmers have included the affidavit in their appendix, but a party cannot use the brief's appendix to supplement the record. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256.

¶10 The Farmers filed "Plaintiff's Notice of Motion and Motion for a New Trial" on February 9, 2011. The notice did not set forth a date and time for the hearing, instead stating that a hearing would take place "at a date, time and place to be set by the court." The circuit court considered the notice inadequate because it "[did] not tell[] anybody anything." On February 18, the court contacted the Farmers' attorney, reminded his office that post-verdict motions were subject to strict statutory time periods, and requested that his office take specific steps to calendar the motion. The following week, Farmers' counsel scheduled a hearing date on the motion for March 29, 2011.

¶11 On March 21, the Farmers' attorney, apparently realizing that the scheduled hearing date exceeded the sixty-day time period for hearing post-verdict motions under WIS. STAT. § 805.16(2), met Judge Nielsen in the courtroom lobby and hand-delivered a motion to enlarge time for a hearing on his post-verdict motion.[3] The Farmers' attorney blamed the court's judicial assistant for the scheduling error. Since March 22 was the final day for hearing the post-verdict motion within the statutory time frame, Farmers' counsel also requested an order waiving the applicable statutory notice requirements because it was "too late to comply with the notice requirements and still have this court timely decide the request [to enlarge time]." The court decided to take up the Farmers' motion to enlarge at the March 29 hearing. At that hearing, the circuit court denied the Farmers' motion to enlarge time and concluded their post-verdict motion was untimely.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

DISCUSSION

¶12 The Farmers raise four issues on appeal. First, they contend the circuit court erred by instructing the jury to disregard the testimony concerning the semi's maladjusted brakes. Second, they assert the court erred by allowing Brandenberg to testify about his investigation findings and the cause of the accident. Third, the Farmers argue the court erred by refusing to hear their post-verdict motion. Fourth, they contend they are entitled to a new trial based on an improper remark in Kotarski's closing argument.

I. Jury Instruction

¶13 "A court has broad discretion in deciding whether to give a particular jury instruction."[4] ***State v. Hubbard***, 2008 WI 92, ¶23, 313 Wis. 2d 1, 752 N.W.2d 839. We will not reverse the court's determination unless it has erroneously exercised its discretion. ***Id.*** In other words, we will uphold the determination if the court examined the relevant facts, applied the proper legal standard, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***LeMere v. LeMere***, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Here, the circuit court properly exercised its discretion

[4] The Farmers frame the instruction as a misstatement of the law, presumably to obtain de novo review. *See* ***State v. Ellington***, 2005 WI App 243, ¶7, 288 Wis. 2d 264, 707 N.W.2d 907 (decision to give a particular instruction rests in the sound discretion of the circuit court, but appellate court independently determines whether the instruction "fully and fairly" informed the jury of the applicable rules of law). However, the Farmers have failed to describe the instruction's legal errors, and it is clear that they challenge the instruction in its entirety. We conclude that this is a challenge to the circuit court's exercise of discretion.

when it prohibited the jury from considering evidence of the semi's brake maladjustment.

¶14 The court first determined that permitting the Farmers to present a "faulty brake" case would unfairly delay the litigation. Inman initially rejected the notion that brake conditions caused the accident, preferring to give Kotarski the "benefit of the doubt." Nearly two years later, and just weeks before trial, Inman filed an affidavit purporting to blame the semi's brakes. The court, noting that discovery had been closed for almost a year, declined to allow the Farmers to amend their pleading and reopen discovery at such a late date. However, the court concluded that there was no way to keep evidence of the maladjusted brakes from the jury since that fact had been mentioned in both expert and police reports. Accordingly, an instruction requiring the jury to disregard the brake evidence was appropriate.

¶15 The circuit court also found the instruction appropriate because Inman's affidavit did not state to what degree the maladjusted brakes contributed to the accident. The Farmers have failed to include Inman's January 2011 affidavit in the record on appeal. Although the affidavit was included in their appendix, we do not consider any materials in an appendix that are not in the record. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256. Consequently, we must disregard that portion of the appendix and assume that the missing portion of the record supports the circuit court's exercise of discretion. ***Id.*** We therefore assume that Inman could not quantify, to a reasonable degree of certainty, precisely how the lack of adjustment

contributed to the loss of braking capacity.[5] Without such testimony, the jury would have been required to speculate about whether and to what extent the brake maladjustment contributed to the accident. The circuit court acted properly in forestalling such speculation. *See* ***Village of Whitefish Bay v. Hardtke***, 40 Wis. 2d 150, 153, 161 N.W.2d 259 (1968) (a finding based on jury conjecture and speculation cannot stand).

II. Brandenberg's Testimony

¶16 The Farmers next assert the trial court erred by allowing Brandenberg to testify about his investigation findings and the cause of the collision. "A trial court's decision to admit or exclude expert testimony is a discretionary determination that is made pursuant to Rule 901.04(1), Stats." ***State v. Blair***, 164 Wis. 2d 64, 74, 473 N.W.2d 566 (Ct. App. 1991). The court's decision will not be upset on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and in accordance with the facts of record. ***Id.***

¶17 The Farmers first argue—wrongly—that Brandenberg's testimony is barred by WIS. STAT. § 344.21. That section prohibits "the report following an accident, the action taken by the department pursuant to this chapter, the findings, if any, upon which such action is based [and] … the security filed as provided in this chapter" from being referred to or used as evidence of negligence in a civil

[5] Indeed, by asserting that such "mathematical precision" was not required, the Farmers all but concede that Inman could not say how the brakes affected the semi's ability to stop.

trial. Even if this section applies to the present case,[6] it does not bar Brandenberg's testimony.

¶18 Brandenberg's testimony did not run afoul of that portion of the statute prohibiting the use of police reports because Brandenberg's report was neither introduced nor referenced at trial. Instead, Brandenberg stated his opinion of the cause of the accident. The Farmers contend the statute also bars this testimony, but that interpretation is deeply flawed. The statute does not prohibit the use of law enforcement's findings, only those of the department of transportation in, for example, determining the amount of security, suspending a driver's operating privileges, or impounding a vehicle. *See, e.g.*, WIS. STAT. §§ 344.13-14. This is the "action" to which the statute refers. Therefore, WIS. STAT. § 344.21 does not prohibit a law enforcement officer from offering his or her opinion about the cause of an accident.

¶19 The Farmers also contend Brandenberg was not qualified to give his opinion and his testimony lacked a sufficient foundation. Whether opinion evidence is admissible and whether a witness is qualified as an expert are discretionary determinations for the trial court. ***Wester v. Bruggink***, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994).

[6] WISCONSIN STAT. ch. 344 governs financial responsibility for motor vehicle accidents. Section 344.21 is located in subchapter II, entitled "Security for Past Accidents;" it is part of the chapter known as the safety responsibility law. *See* WIS. STAT. § 344.22. A contextual analysis of the surrounding statutes suggests the legislature intended § 344.21 to prevent evidence of financial responsibility from tainting a fact-finder's negligence determination. The more relevant statute is WIS. STAT. § 346.73, which generally prohibits accident reports from being used as evidence.

¶20 The Farmers primarily rely on ***City of Milwaukee v. Bub***, 18 Wis. 2d 216, 118 N.W.2d 123 (1962). In that case, our supreme court held that an experienced police officer is not necessarily qualified to identify the point of impact in an automobile accident. ***Id.*** at 224-25. We reaffirmed ***Bub*** in ***Wester***, holding that "it takes an understanding of technical and scientific accident reconstruction principles to assess the point of impact from gouge and skid marks and debris at the accident scene." *See* ***Wester***, 190 Wis. 2d at 319.

¶21 Neither ***Bub*** nor ***Wester*** is helpful here, however. Brandenberg was not asked to determine the point of impact. Instead, he was asked to opine about the cause of the accident. Brandenberg was adequately qualified to offer this opinion; he received training in accident investigation and investigated hundreds of accidents, frequently reaching conclusions about their cause. Brandenberg also laid a sufficient foundation for his opinion: he had viewed the accident scene and examined the vehicles there, and had heard Janelle Farmer's version of events. Any arguable infirmities in Brandenberg's testimony went to the weight of his opinion and not its admissibility. *See* ***Bear v. Kenosha Cnty.***, 22 Wis. 2d 92, 100, 125 N.W.2d 375 (1963).

III. Motion for a New Trial

¶22 The Farmers claim the circuit court erred in refusing to hear their motion for a new trial. First, they argue that a portion of their motion would have been timely heard on March 29, 2011 because it involved "newly discovered evidence" under WIS. STAT. § 805.16(4).[7] Second, they argue the circuit court

[7] Given our resolution of the appeal, the nature of the alleged "newly discovered evidence" is irrelevant.

erred when it refused to grant the Farmers' motion to enlarge time on that part of the motion not based on newly discovered evidence.

¶23 We begin with the Farmers' claim that a portion of their post-verdict motion should have been timely heard on March 29, 2011. WISCONSIN STAT. § 805.16(2) directs that a hearing on post-verdict motions must be held "not less than 10 nor more than 60 days after the verdict is rendered, unless enlarged pursuant to motion …." However, a motion based on newly discovered evidence may be made within one year after a verdict is rendered; the motion is deemed denied if an order is not entered within 90 days after the motion's filing. *See* WIS. STAT. § 805.16(4). Thus, § 805.16(4) establishes a de facto ninety-day hearing period for claims based on newly discovered evidence.

¶24 The Farmers contend a portion of their motion relied on newly discovered evidence, and that portion should have been timely heard at the March 29 hearing. However, the hearing transcript shows the Farmers never argued the newly discovered evidence standard under WIS. STAT. § 805.16(4) applied. In fact, it does not appear the Farmers ever argued below that anything other than the sixty-day hearing requirement applied. An appellant must articulate each of its theories to the trial court to preserve its right to appeal. ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476.

¶25 The Farmers also contend the court applied the wrong standard when refusing to grant their motion to enlarge time to hear those portions of the post-verdict motion not based on newly discovered evidence. There is no dispute that these portions of the motion were subject to the sixty-day hearing requirement of WIS. STAT. § 805.16(2). Under WIS. STAT. §§ 805.16(2) and 801.15(2)(a), a motion to enlarge made within the sixty-day period may be granted "for cause

shown and upon just terms." If made after the sixty-day period, the court may grant the motion to enlarge only if it finds "that the failure to act was the result of excusable neglect." ***Id.*** The Farmers argue the court erred by applying the "excusable neglect" standard rather than the more permissive "for cause shown" standard.

¶26 However, it is apparent the circuit court did, in fact, consider whether the Farmers had satisfied their burden under the lower standard. In essence, the court determined that the Farmers' attorney had left the scheduling to his assistant, who was not aware of the applicable time limitations. The court repeatedly said that this did not constitute "good cause" to enlarge, at one point specifically saying, "The fact that secretaries are relied on [for scheduling] … is not a good cause to relieve attorneys from the obligation of following the requirements of the statute." The court concluded the hearing by stating that the Farmers had not satisfied either the "excusable neglect" or "good cause" standard.[8]

IV. Closing Arguments

¶27 The Farmers' final contention is that they are entitled to a new trial because the defendants' attorney referred to Janelle Farmer's absence from trial during his closing argument. The Farmers did not object to this statement at the time, nor did they move for a mistrial. Accordingly, they have forfeited this

[8] The Farmers have not responded to Kotarski's argument that the circuit court applied the proper standard. They have therefore conceded the argument. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶9, 232 Wis. 2d 53, 606 N.W.2d 590. Instead, they switch tactics and argue there is some difference between the "for cause shown" standard under WIS. STAT. § 801.15(2)(a) and the "good cause" standard the circuit court used. However, they have failed to cite any legal authority making such a distinction. We therefore decline to consider their argument. *See* ***Hoffman***, 232 Wis. 2d 53, ¶9.

argument on appeal. *See* ***Chart v. General Motors Corp.***, 80 Wis. 2d 91, 107-08, 258 N.W.2d 680 (1977).

¶28 The Farmers attempt to avoid this rule by invoking the plain error rule under WIS. STAT. § 901.03(4). That statute permits a court to take notice of plain errors affecting substantial rights although they were not brought to the judge's attention. ***Id.*** However, the Farmers concede this is a rule of evidence, and an attorney's closing arguments are not evidence. *See* ***State v. Mayo***, 2007 WI 78, ¶44, 301 Wis. 2d 642, 734 N.W.2d 115.

By the Court.—Judgment affirmed.

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