COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP187 **Cir. Ct. No. 2011CV121**

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

LINDA WACHHOLZ AND RONALD WACHHOLZ,

PLAINTIFFS-APPELLANTS,

V.

OTTO ENVIRONMENTAL SYSTEMS OF NORTH AMERICA, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. A jury returned a verdict finding no negligence or strict liability against Otto Environmental Systems of North America, Inc. for injuries Linda Wachholz suffered while using an Otto product. Linda and her

husband, Ronald Wachholz, appeal, alleging that the court made a series of erroneous and prejudicial evidentiary rulings. We disagree and affirm.

¶2 Otto manufactures the Otto Edge 95, a ninety-five-gallon, two-wheeled, hinged-lid garbage cart designed for use with automated garbage trucks. Otto sells the carts to municipalities and waste haulers, which provide them to residential users for garbage and recycling pickup. Consistent with recognized industry standards for design and warnings, the carts bear the warning "CLOSE LID BEFORE MOVING," printed in embossed green letters on a green lid. While moving an Otto Edge 95 cart with its open lid hanging down, Linda stepped on the lid. The cart flipped backwards on her, injuring her.

¶3 The Wachholzes alleged that Otto was negligent in its cart design, in failing to adequately warn and provide use instructions, and in providing an unreasonably dangerous product. The jury found in favor of Otto.

¶4 The Wachholzes' appeal focuses on allegedly erroneous evidentiary rulings on motions in limine. First, they claim the trial court erred in permitting "negative evidence." "Negative evidence" is evidence that there were no similar accidents or claims involving a particular product. ***Glassey v. Continental Ins. Co.***, 176 Wis. 2d 587, 606, 500 N.W.2d 295 (1993). The Wachholzes contend Otto should not have been allowed to introduce evidence that it had no records of injuries, as it allowed an inference that Otto's carts in fact caused few injuries.

¶5 A trial court has broad discretion in making evidentiary rulings. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We review such rulings "only to determine whether the trial court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion." ***Glassey***, 176 Wis. 2d at 608. "Negative evidence" is

admissible if the witness is "in a position to testify on the basis of personal knowledge or experience that the event did not occur." ***D.L. v. Huebner***, 110 Wis. 2d 581, 622, 329 N.W.2d 890 (1983).

¶6 The trial court allowed Otto to present, through deposition testimony of two employees, "product feedback type information" Otto received from municipalities and waste haulers, its direct customers, regarding reports of injuries. This court is unclear as to the extent and nature of that evidence, however. The two employees' testimony is not included in the excerpted trial transcripts. The deposition transcripts apparently were trial exhibits, but the exhibits were not made part of the appellate record.[1] The Wachholzes' appendix contains edited portions of the employees' depositions but those portions do not address Otto's claim that it maintained customer-feedback records and that its customers would have conveyed reports of end-user injuries. Further, the appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

¶7 To the extent the appellate record is incomplete in connection with an issue the appellant raises, "we must assume that the missing material supports the trial court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). Allowing product feedback testimony carried with it an implicit finding that the two employees were in a position to testify on the basis of personal knowledge that no reports had been made. Such "negative

[1] The index to the appellate record compiled by the trial court clerk indicates that document 51 is a six-page exhibit list. It also indicates in bold, upper-case letters, "**EXHIBITS WILL REMAIN AT CIRCUIT COURT**."

evidence" is admissible under ***Glassey***. The court did not erroneously exercise its discretion.

¶8 The Wachholzes next argue that the court erred in allowing two of Otto's witnesses to present evidence of the cost of implementing design alternatives. They contend it is not permitted under the "consumer expectation test" and is not relevant to the Otto 95's safety or to whether this particular cart was defective when Linda was injured.

¶9 Wisconsin adhered to the consumer expectation, or contemplation, test in product liability cases commenced, like the Wachholzes', before February 1, 2011. *See* ***Sumnicht v. Toyota Motor Sales, U.S.A., Inc.***, 121 Wis. 2d 338, 368, 360 N.W.2d 2 (1984); *see also* 2011 Wis. Act 2, §§ 31, 45. The test essentially asked whether the product was defective or dangerous to an extent beyond that which an ordinary, reasonable consumer would have contemplated. *See* ***Sumnicht***, 121 Wis. 2d at 370; *see also* ***Green v. Smith & Nephew AHP, Inc.***, 2001 WI 109, ¶77, 245 Wis. 2d 772, 629 N.W.2d 727.

¶10 Under the test, a court may consider five factors when determining whether a product is unreasonably dangerous. ***Sumnicht***, 121 Wis. 2d at 372; ***Green***, 245 Wis. 2d 772, ¶27. One is "the ability of a manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive." ***Sumnicht***, 121 Wis. 2d at 372; ***Green***, 245 Wis. 2d 772, ¶27. The court here permitted limited questions in regard to economic considerations that might factor into product modifications. That was not a misuse of discretion.

¶11 The Wachholzes also contend the court erred by limiting the testimony of their expert, Kim Brokaw. After himself being injured in an incident similar to Linda's, Brokaw invented and patented two devices to prevent or reduce

cart-related accidents. Brokaw also commissioned a survey (the Vernon report) of other alleged cart-tipping incidents. The court limited Brokaw's testimony to his own injury experience, descriptions of his inventions, and his opinions that the carts are unsafe and that the rate of injury is greater than what Otto claimed. It deemed the bases for his opinions and the interviews and investigative methods in the Vernon report inadmissible hearsay, however.

¶12 Information in the Vernon report about other alleged cart-related injuries is hearsay. *See* WIS. STAT. § 908.01(3) (2013-14).[2] While WIS. STAT. § 907.03 "allows an expert to base an opinion upon data that constitute hearsay if the data are of a type reasonably relied upon," it is not a hearsay exception, nor does it make inadmissible hearsay admissible. ***State v. Watson***, 227 Wis. 2d 167, 198-99, 595 N.W.2d 403 (1999) (citation omitted). "Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect." WIS. STAT. § 907.03. The court did not make that determination. Its limiting of Brokaw's opinion testimony was a proper exercise of discretion.

¶13 The Wachholzes also complain that the court permitted Otto employee Jack Lutes to testify as an expert about the costs to make the garbage carts safer. Lutes, who has extensive sales and bidding experience in the waste industry, intended to testify that installing devices such as the "lid latch" Brokaw invented would result in additional costs and, ultimately, lost bids.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

¶14 Lutes did not testify as an expert. The court plainly stated that Lutes "was not designated as an expert so his testimony could not be rendered as an expert" and that Lutes's testimony about the impact of increased costs was within the ken of lay jurors. *See* ***Olfe v. Gordon***, 93 Wis. 2d 173, 180, 286 N.W.2d 573 (1980) (expert testimony not necessary when matter to be proved within area of common knowledge and lay comprehension).

¶15 Lutes said he could not divulge if Otto's engineering department had taken steps to develop a lid latch similar to Brokaw's, as it was proprietary information. The Wachholzes asked the court for a protective order and to compel him to respond. The court denied the request on the basis that the query was beyond the scope of Lutes' intended testimony. The ruling was within the court's "broad discretion in determining whether to limit discovery through a protective order." ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999).

¶16 Lastly, the Wachholzes request a new trial in the interest of justice, asserting that the erroneous exclusion of evidence prevented the real controversy from being fully tried and that it is probable that justice miscarried. *See* WIS. STAT. § 752.35. The trial court's evidentiary rulings were not error. We decline.

By the Court.—Judgment affirmed.

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