COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1878

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

RUSSELL F. STECHSCHULTE,
SPECIAL ADMINISTRATOR OF THE
ESTATE OF EDIGNA STECHSCHULTE,

PLAINTIFF-RESPONDENT,

V.

FIRST FEDERAL SAVINGS BANK OF WISCONSIN,

DEFENDANT-APPELLANT,

JOHN A. STECHSCHULTE,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Reversed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 SNYDER, J. This is an appeal from an order changing an answer in a jury verdict in favor of First Federal Savings Bank of Wisconsin (First Federal) and from a subsequent judgment for $127,314.13 in favor of the Estate of Edigna Stechschulte (the Estate). First Federal contends that credible evidence was presented to support the jury's verdict finding that Edigna, mother of Russell and John Stechschulte, was not incompetent at the time she executed an agreement subordinating her interest in mortgages held on John's property to a mortgage held by First Federal. We agree with First Federal and therefore reverse.

BACKGROUND

¶2 At the heart of the Estate's complaint is its contention that John and First Federal were responsible for the depletion of Edigna's estate from a purported value of $500,000 in 1988 to less than $20,000 in July 1994. According to Russell, this depletion was accomplished through a series of mortgage transactions culminating in Edigna's execution of a subordination agreement on December 23, 1991. We highlight these transactions below.

¶3 At the outset, we note that Edigna had given John power of attorney over her financial and legal affairs beginning in 1973. John was given another power of attorney in June 1987. In March 1986, John and his wife, Nancy Stechschulte, gave Edigna a mortgage on their home in the amount of $75,000 and in February 1990, granted Edigna a second mortgage on their home for $200,000. At the time that these mortgages were granted, First Federal held a superior mortgage on John and Nancy's home with a balance of $64,432.32 on December 23, 1991.

¶4 In addition to mortgages on their residence, John and Nancy granted a first mortgage in the amount of $67,000 to First Federal in 1987 on commercial

property they owned. They also obtained a loan of $118,000 from First Federal in 1989 secured by a pledge of stock owned by Edigna. In December 1990, John and Nancy granted Edigna a second mortgage on the commercial property in the amount of $80,000.[1]

¶5 On December 23, 1991, in an effort to restructure their debt, John and Nancy granted First Federal a mortgage in the amount of $220,000 secured by their residence. As part of this mortgage transaction, Edigna agreed to subordinate her mortgages in the amount of $275,000 to First Federal's mortgage for $220,000. On the same date, Edigna executed the subordination agreement at her nursing home in the presence of John and First Federal Savings Bank president Jerome Groh.

¶6 John subsequently defaulted on his loan obligations to First Federal, and, accordingly, First Federal began a foreclosure action. In December 1993, the circuit court for Waukesha county entered a judgment of foreclosure, and John and Nancy's residence was sold for $250,000. The proceeds of the sale satisfied John and Nancy's loans to First Federal but were insufficient to cover their debt to Edigna.

¶7 On February 10, 1995, Russell brought this action as special administrator of the Estate against First Federal and John. The complaint sought to set aside the subordination agreement entered into between Edigna and First Federal. Russell alleged conspiracy, breach of fiduciary duty, lack of consideration, misrepresentation, fraud and incapacity by Edigna to enter into the

[1] The commercial property subject to these mortgages later became worthless due to underground pollution from petroleum storage tanks.

subordination agreement. First Federal denied the claims. John, whose debts were discharged in bankruptcy on October 6, 1993, was dismissed from the action.

¶8 On February 20 and 21, 1996, Russell's action against First Federal was tried before a jury. Russell presented testimony that Edigna was ninety-five years old and had been diagnosed with dementia at the time of the subordination agreement. Russell called Edigna's personal physician and a nurse at Edigna's nursing home; both testified to Edigna's dementia. At the conclusion of the trial, the jury was presented with a special verdict. Question No. 1 read as follows:

> Was Edigna Stechschulte suffering from such diminished mental capacity that she was unable to understand the nature and consequences of the [subordination agreement] on December 23, 1991?
>
> Answer: _____
>
> (Yes or No)

The jury answered "no."

¶9 Following the conclusion of the trial, Russell brought a § 805.14(5)(c), STATS., motion asking the court to change the jury's answer to Question No. 1 on the ground that there was insufficient evidence to support the jury's conclusion. The court granted Russell's request. It then ordered a new trial on the remaining issues regarding whether First Federal knew or should have known of Edigna's incompetence. At the conclusion of the second trial, the Estate was awarded damages of $117,514.[2] First Federal appeals.

[2] A judgment of $127,314.13 was awarded to the Estate which included damages and costs.

DISCUSSION

¶10 First Federal contends that the trial court erred in granting Russell's motion to change the jury's answer concerning whether Edigna was competent at the time of the subordination agreement. A motion challenging the sufficiency of the evidence to support a verdict may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Section 805.14(1), STATS. This standard applies to any motion challenging the sufficiency of the evidence and is to be used by both the trial court and an appellate court reviewing the trial court's determination. *See* ***Richards v. Mendivil***, 200 Wis.2d 665, 670, 548 N.W.2d 85, 88 (Ct. App. 1996).

¶11 In reviewing an order changing a jury's answer, we give substantial deference to the trial court's better ability to assess the evidence. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995). However, an appellate court may overturn the trial court's decision to change the jury's answer if the record reveals that the trial court was "clearly wrong." *See* ***Richards***, 200 Wis.2d at 671-72, 548 N.W.2d at 88. The trial court is clearly wrong if it changes the jury's answer while there is credible evidence supporting the jury's finding. *See* ***id.*** at 672, 548 N.W.2d at 88. The credible evidence standard is broad as it considers "*any* credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing.'" ***Weiss***, 197 Wis.2d at 390, 541 N.W.2d at 761-62 (quoted sources omitted).

¶12 After Russell moved the trial court to change the jury's answer as to Edigna's ability to understand the nature of the subordination agreement, the court

issued an order on May 31, 1996, changing the answer. In doing so, the court "concluded that there was no evidence which would create an issue of material fact over which reasonable minds could differ regarding Edigna Stechschulte's competence on December 23, 1991." First Federal, however, failed to provide us with a transcript of the court's bench decision which presumably contained the court's rationale for deciding to change the jury's answer. Because we do not have the trial court's decision, we limit the scope of our appellate review to the record before us. *See* ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979). In the absence of a transcript, we ordinarily assume that "every fact essential to sustain the trial judge's exercise of discretion is supported by the record." ***Id.*** The record, however, does contain all the trial transcripts, and thus we are able to assess whether credible evidence supports the jury's answer, albeit without the benefit of the trial court's reasoning.

¶13 The law presumes that every adult person is fully competent until satisfactory proof to the contrary is presented. *See* ***Hauer v. Union State Bank***, 192 Wis.2d 576, 589, 532 N.W.2d 456, 461 (Ct. App. 1995). The burden of proof is on the person seeking to void the act. *See* ***id.*** The test for determining competency is whether the person involved had sufficient mental ability to know what he or she was doing and the nature and consequences of the transaction. *See*

id. at 589-90, 532 N.W.2d at 461. Almost any conduct may be relevant, as may lay opinions and expert opinions. *See* ***id.*** at 590, 532 N.W.2d at 461.[3]

[3] Russell contends that, while it was harmless error, the trial court submitted the wrong competency instruction. Russell points out that although the burden would ordinarily be on him to prove Edigna's incompetency at the time of the execution of the subordination agreement, in this case the burden shifted to First Federal. Russell cites ***Ripley v. Babcock***, 13 Wis. 474 [*425] (1861), which held that when a mortgage is executed by a person who is incompetent, the mortgagor must establish that the mortgage was executed during a period of lucidity, otherwise the mortgage would be void. *See* ***id.*** at 479 [*429]. While we agree that ***Ripley*** supports a burden shifting competency instruction where a period of incompetency is established, the instruction used by the trial court was not incorrect. The instruction given to the jury read as follows:

> The test for determining competency is whether the person involved had sufficient mental ability to know what he or she was doing and the nature and consequences of the transaction.
>
> If you find that Edigna Stechschulte had sufficient mental ability to understand the nature and consequences of signing the Subordination Agreement, then you should answer that question "no". If, however, you conclude that Edigna Stechschulte did not have sufficient mental ability to understand the nature and consequences of the Agreement, then you should answer that question "yes".
>
> The law presumes that every adult is fully competent until satisfactory proof has been presented to the contrary. The burden of proof is on the person seeking to have the individual found incompetent, or in this case, on the plaintiff.
>
> In considering this question, you are instructed that a person may be competent sometimes, and incompetent at other times. Infirmities of old age, such as forgetfulness and confusion, do not necessarily mean that the person is incompetent. Rather, a person may be incompetent at times, and competent at other times. This question of the Special Verdict requires you to determine only whether, on December 23, 1991 at the time the Subordination Agreement was presented to Edigna Stechschulte, she was competent.

This instruction is consistent with Wisconsin law. *See* ***Hauer v. Union State Bank***, 192 Wis.2d 576, 589-90, 532 N.W.2d 456, 461 (Ct. App. 1995). While Russell could have argued for a jury instruction consistent with ***Ripley*** when the trial court reviewed the instructions at the close of evidence, he did not. Russell's argument is therefore waived. *See* ***State v. Zelenka***, 130 Wis.2d 34, 44, 387 N.W.2d 55, 59 (1986) (failure to object to a jury instruction before the trial court constitutes a waiver of the error).

¶14 Here, Russell had the burden to demonstrate that Edigna was incompetent at the time she executed the subordination agreement. Russell's evidence included testimony from Edigna's personal physician, Dr. John Harris, who stated that Edigna had been diagnosed with dementia on December 3, 1991. He opined that based upon her mental condition in December, she would not have likely understood the nature and consequences of signing the subordination agreement. Russell next called nurse Kandy Dutcher who was working at Edigna's nursing home in December 1991. Dutcher testified to the notes taken by Edigna's nurse at the nursing home. The notes documented Edigna's physical and mental capacity during December 1991, and included numerous entries describing Edigna as confused and disoriented. There were no notations, however, pertaining to Edigna's condition from December 21 to 23.

¶15 Russell also called Edigna's grandson, Donald Stechschulte, a family physician, who visited Edigna in July 1988, December 1990 and June 1991, and observed a progressive deterioration of her mental faculties consistent with a diagnosis of dementia. Finally, John Stechschulte testified that he was aware that Edigna had been diagnosed with dementia on December 3, 1991.

¶16 While acknowledging at trial that there was "substantial evidence" that Edigna was incompetent on December 23, First Federal nonetheless contends that credible evidence was offered by which a reasonable jury could conclude that Edigna was competent when she executed the subordination agreement. First Federal points to Edigna's nurse's notes which stated that on December 5, Edigna was "[v]ery pleasant but confused—had periods where she was lucid." First Federal argues that this notation supports the jury's finding of competence on December 23. Next, First Federal notes that there was no expert witness who testified to a reasonable degree of medical probability that Edigna was

incompetent at the time the subordination agreement was signed. First Federal also relies upon the lack of any nurses' notes for December 21, 22 and 23.

¶17 Finally, First Federal points out that of the individuals present at the time of the execution of the subordination agreement, only John testified at trial.[4] John testified that he, Groh and Edigna met at Edigna's nursing home for ten to fifteen minutes, but that he had no recollection of what questions were asked of Edigna or any specific details of the meeting other than that the subordination agreement was signed. First Federal contends that the absence of any specific testimony concerning Edigna's condition at the time of the signing of the agreement could have led a reasonable jury to infer that Edigna was lucid when she signed the agreement or that Russell had failed to meet his burden of proof as to that issue.[5]

¶18 We are persuaded that credible evidence was presented to support the jury's finding that Edigna had the mental capacity to understand the nature and consequences of the subordination agreement. As First Federal points out, Edigna's nurse's notes state that Edigna had a period of lucidity on December 5. In addition, there was no direct evidence of Edigna's condition on or during the two days prior to December 23. While First Federal offered no evidence of its own to establish Edigna's competency on December 23, it was Russell's burden to

[4] Edigna was not called to testify, and First Federal Savings Bank president Jerome Groh died in February 1995.

[5] First Federal further contends that a "comparison of Edigna['s] … signature on the Subordination Agreement on December 23, 1991 with Edigna's signature contained on the other documents submitted during the course of the trial shows no perceptible difference in either the style or manner in which the signature was affixed to the Subordination Agreement." This argument is unfounded because First Federal presented no evidence demonstrating any correlation between handwriting and dementia.

prove incompetency, not First Federal's burden to prove competency. We are convinced that the jury had credible evidence upon which to rely to conclude that Edigna was not incompetent at the time of executing the subordination agreement. The trial court's order changing the jury's answer must therefore be reversed.[6]

By the Court.—Judgment and order reversed.

Not recommended for publication in the official reports.

[6] Because we reverse on the ground that there was credible evidence to support the jury verdict, we need not address First Federal's contention that Russell's claim was barred by application of the doctrine of claim preclusion.

¶19 NETTESHEIM, J. *(dissenting)*. I would affirm the trial court's ruling changing the jury's answer that Edigna Stechschulte was competent when she signed the subordination agreement. Therefore, I respectfully dissent.

¶20 I begin by setting out the procedural context in which this issue arose in the trial court. This issue first surfaced at the close of the evidence when the Estate moved for a directed verdict pursuant to § 805.14(4), STATS., asking the trial court to rule as a matter of law that Edigna was incompetent when she executed the subordination agreement. The court said that it was "close to finding [incompentency] as a matter of law." However, the court prudently chose the better procedure of taking the matter under advisement and then revisiting the issue after the jury had rendered its verdict. *See* ***Village of Menomonee Falls v. Michelson***, 104 Wis.2d 137, 154, 311 N.W.2d 658, 666 (Ct. App. 1981).

¶21 The evidence reveals the following. On December 3, 1991, Dr. John Harris, Edigna's personal physician, diagnosed Edigna as suffering from dementia. Harris equated medical dementia with legal incompetence. Edigna was then ninety-five years of age and residing in a nursing home. The nurse's notes for December 1991 repeatedly recorded Edigna's confusion. For instance, on December 5, Edigna wanted to know where she was, how she got there and why she was not told about the move. On December 6, Edigna did not know where she was, what season it was or who she was. On December 7, Edigna stated that she needed to go home to tend to her two-year-old son. On December 8, she talked about calling her husband, who had been dead for forty years, to take her home.

On December 20, a nurse's entry noted that Edigna was "confused in all realms of daily living." Three days later Edigna signed the subordination agreement tendered to her at the nursing home by John and a First Federal representative. The next day, a nurse's entry noted that Edigna wanted to know why her son was not in therapy.

¶22 Other evidence documented that during December 1991, Edigna could not recall the location of her room, the season, the identity of staff or the fact that she was in a nursing home. John, himself, recognized Edigna's disability. At a future care conference on December 3, John indicated that Edigna should not participate "due to [her] level of confusion." At a similar meeting on December 11, Edigna again did not attend because of her "impaired thought processes."

¶23 Against this evidence, First Federal mounted a lone piece of positive evidence—a December 5 nurse's entry that noted a "period of lucidity." However, it is interesting to note that on this same date Edigna did not know where she was, how she got there and why she was not told about the move. Moreover, even assuming that Edigna exhibited a moment of lucidity, no reasonable jury could conclude that she was in a mental state capable of grasping the legal significance of a subordination agreement.

¶24 Beyond this, First Federal falls back on negative evidence. First, First Federal observes that Edigna had never been declared legally incompetent. This argument begs the question. A finding of legal incompetence is not essential to establish the fact of incompetence.

¶25 Second, First Federal argues that the Estate did not present any competent medical testimony that Edigna was incompetent. This is wrong. Harris so testified. The fact that he did not use the words or phrases that First Federal

would have preferred does not change this fact. *See* ***Powers v. Allstate Ins. Co.***, 10 Wis.2d 78, 86, 102 N.W.2d 393, 397-98 (1960).

¶26 Third, First Federal argues that the Estate did not produce any evidence specifically referring to Edigna's incompetence on December 23, 1991, the day she signed the subordination agreement or the two days prior thereto. This argument places an unreasonable (and perhaps impossible) burden on a party seeking to establish incompetence by requiring an almost daily competency evaluation of one such as Edigna. Moreover, at the time of these events, no one anticipated that five years later the question of Edigna's competency would become a critical issue in a lawsuit.

¶27 Fourth, First Federal argues that Edigna's signature on the subordination agreement is similar to her signature on other documents she had previously signed. The relevance of this evidence is highly questionable. No one in this case testified as to the significance of this evidence. But even according this evidence a degree of relevance, I fail to see how any reasonable jury could conclude that it established Edigna's competency in light of the compelling evidence to the contrary.

¶28 The jury's verdict defies logic and common sense. It flies in the face of the credible and unchallenged evidence in this case. After giving full deference to the jury's verdict and assessing the evidence in a light most favorable to First Federal, I conclude that the credible evidence does not support the jury's finding.

¶29 What is especially troubling in this case is the failure of First Federal, in its role as the appellant, to provide us with the transcript of the trial

court's bench decision detailing its reasons for overturning the jury's answer.[1] ***Richards v. Mendivil***, 200 Wis.2d 665, 548 N.W.2d 85 (Ct. App. 1996), cautions that "[w]hen we review an order changing the jury's answers, we begin with considerable respect for the trial court's better ability to assess the evidence." ***Id.*** at 671, 548 N.W.2d at 88. I fail to understand how the majority can say the trial court erred in its assessment of the evidence when we have not been provided with the court's analysis of the evidence and its reasons for changing the jury's answer.[2] It is the burden of the appellant to demonstrate that the trial court erred. *See* ***Seltrecht v. Bremer***, 214 Wis.2d 110, 125, 571 N.W.2d 686, 692 (Ct. App. 1997). When presented with an incomplete appellate record in connection with the issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***id***. *See also* ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993).

¶30 I have learned over the years that trial courts very often provide us with wise and prudent decisions that appellate lawyers sometimes overlook or ignore. In addition, those decisions often provide an analysis that does not occur to us. Unless it appears that the trial court was clearly wrong (which, after all, is the legal test in this setting), I am hesitant to join in a reversal of a trial court's ruling without the benefit of the court's thinking on the issue. That hesitancy is especially proper in cases such as this where, unlike us, the trial court had the

[1] The trial court first addressed the Estate's postverdict motion in a hearing on April 5, 1996. At the conclusion of the hearing, the court scheduled the matter for a bench decision on May 15, 1996. As noted, the appellate record does not include a transcript of the court's bench ruling. If the court altered its plans and instead issued a written decision, the appellate record is similarly deficient.

[2] First Federal makes no complaint that the trial court's analysis (whatever it was) was incomplete or lacking in necessary detail.

benefit of seeing and hearing the witnesses and the question before us is a close call.

¶31 Because I would affirm the trial court's ruling, it is necessary for me to address First Federal's alternative argument. First Federal contends that the Estate was precluded from litigating the validity of the subordination agreement in this case because Edigna had failed to do so in a prior foreclosure proceeding commenced by First Federal in 1993. Since that proceeding declared the priority of the parties' rights as against each other, and since the Estate did not seek relief pursuant to § 806.07, STATS., in that proceeding, First Federal contends that the Estate may not litigate the validity of the subordination agreement in this case.

¶32 I will not burden this dissent with a discussion of all the relevant factors that can bear upon an issue preclusion claim. *See* ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 551, 525 N.W.2d 723, 727-28 (1995). Suffice it to say that even where all the factors in support of issue preclusion are formally satisfied, the ultimate decision whether to apply the doctrine is fairness based. *See* ***Desotelle v. Continental Cas. Co.***, 136 Wis.2d 13, 21-22, 400 N.W.2d 524, 527 (Ct. App. 1986). This is a question addressed to the trial court's discretion. *See* ***Paige K.B. v. Steven G.B.***, 226 Wis.2d 210, 225, 594 N.W.2d 370, 377 (1999).

¶33 Here, Edigna was ninety-seven years old and suffering from dementia when the foreclosure action commenced. John, the codefendant, held Edigna's power of attorney. Yet, he took no steps to assist Edigna in defending the action. While not forgivable, John's inaction is understandable because he had consistently acted in violation of his fiduciary duty to Edigna. In short, Edigna had no meaningful opportunity to defend in the prior action.

¶34 First Federal also contends that issue preclusion should be applied against Russell because he failed to seek relief from the foreclosure judgment pursuant to § 806.07, STATS. However, Russell, who was a resident of California during the relevant period of time, knew nothing about the foreclosure action until long after the judgment was entered. Moreover, he did not see the subordination agreement until after the sheriff's sale of the property and only two weeks before the sale was confirmed. It is not reasonable or fair to expect that Russell, a nonlawyer, would learn within that two-week period that Edigna had a legal basis to challenge the foreclosure and could make the necessary arrangements to formally register that challenge.

¶35 First Federal correctly argues that we must also consider fairness from its perspective. But I conclude that the equities clearly come down on the Estate's side as to this issue. Edigna, through no fault of her own, did not have her day in court in the prior proceeding. As a result, she lost her potential interest in a significant asset pursuant to a default judgment. In this case, Edigna sought that day in court. The trial court properly recognized this need. The court properly exercised its discretion by rejecting First Federal's issue preclusion argument.

¶36 The jury's verdict represented a miscarriage of justice. The trial court corrected that by changing the answer and sending the case on for trial on the remaining issues. I would affirm the court's ruling. I respectfully dissent.