COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2525

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

SEIDEL TANNING CORPORATION,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Seidel Tanning Corporation appeals from a judgment, entered after a jury trial, dismissing its claims against the City of Milwaukee for damages to its warehouse that it claims were caused by a series of water main breaks. Seidel claims that the trial court erred by: (1) not allowing it to

call adversely the City's expert witness during its case-in-chief; (2) preventing one of its witnesses from testifying on new measurements that were not disclosed to the City through supplemental discovery; (3) not imposing strict liability on the City, or alternatively, not instructing the jury on *res ipsa loquitur*; and (4) erroneously instructing the jury on damages and failing to instruct on municipal nuisance.

I. BACKGROUND

¶2 Seidel purchased a building and used it as a warehouse. After its purchase, the north end of the building developed significant cracks and appeared to be settling into the ground. Seidel sued the City, claiming that the building had deteriorated "as a direct result of the underground flowage … caused by" a series of water main breaks which were, in turn, caused by the City's negligence in failing to maintain the pipes properly. The case went to the jury only on the issues of negligence and nuisance.[1] The jury found for the City and the trial court dismissed the complaint.

II. DISCUSSION

A. Refusal to allow tanning company to call City's expert adversely.

¶3 Seidel asserts that it should have been permitted to call adversely the City's expert witness during Seidel's case-in-chief. Trial courts have wide discretion in admitting expert opinion evidence. *See* ***Kreyer v. Farmers' Co-op. Lumber Co.***, 18 Wis. 2d 67, 75, 117 N.W.2d 646, 650 (1962). A trial court

[1] Seidel also pled inverse condemnation in its complaint. This claim, however, was dismissed by the trial court's grant of summary judgment. Seidel does not seek review of the trial court's dismissal of this claim.

appropriately exercises its discretion if it acts as a reasonable judge might act, in accordance with governing legal principles. *See* ***Kerans v. Manian Outdoors Co.***, 167 Wis. 2d 122, 130, 482 N.W.2d 110, 113 (Ct. App. 1992). Generally, "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision," we will affirm. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987) (citation omitted).

¶4 Seidel, however, has not included the trial court's rationale on this issue in the appellate record. "An appellate court's review is confined to those parts of the record made available to it." ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). 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); *see also* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986) (burden on appellant to ensure that record is sufficient to address issues raised on appeal); WIS. STAT. RULE 809.15(1)(a)13 (the record on appeal shall include a transcript of reporter's notes). Indeed, when the record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling. *See* ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989). Because we must assume that the trial court's ruling is supported by the missing record, we conclude that the trial court did not erroneously exercise its discretion.

B. Testimony precluded on recent measurements of building.

¶5 Seidel next claims that the trial court erred by not permitting its Plant Superintendent, James Chaney, to testify regarding measurements of the building taken on the evening before trial but not provided to the City through

supplemental discovery. Again, the admission of evidence is within the sound discretion of the trial court and will not be overturned on appeal absent an erroneous exercise of discretion. *See* ***State v. Mink***, 146 Wis. 2d 1, 13, 429 N.W.2d 99, 104 (Ct. App. 1988). WISCONSIN STAT. § 804.01(5) provides that a party who has responded to a discovery request must supplement the response to include information acquired thereafter when "the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment."[2] If a party fails seasonably to supplement or amend a response when obligated to do so under § 804.01(5), the court may "prohibit[] the disobedient party from introducing designated matters in evidence." WIS. STAT. § 804.12(2)(a)2.[3]

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[2] WISCONSIN STAT. § 804.01(5) provides, in pertinent part:

> SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> ...
>
> (b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made, or 2. the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> (c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] WISCONSIN STAT. § 804.12(2)(a)2 provides, in pertinent part:

> **Failure to make discovery; sanctions. (2)** FAILURE TO COMPLY WITH ORDER. (a) If a party … fails to obey an order to provide

(continued)

¶6 Here, the trial court reasonably determined that Seidel was required to supplement the City's discovery with the recent measurements. The trial court acted within its discretion when it precluded that portion of Mr. Chaney's testimony which involved those measurements, noting: "This measuring was done during the trial without notice to the defendants that you were doing it. I am not going to let you use it as part of your case, counsel. You will go with the measurements that you provided to the City during the discovery process." Although Seidel argued before the trial court that the new measurements were consistent with those provided earlier and would merely reinforce the opinions of their experts, the trial court reasonably disagreed, and acted within the ambit of its discretion.[4]

C. Strict Liability

¶7 Seidel also argues that the trial court should have imposed strict liability on the City. Seidel, however, did not assert a claim of strict liability in its

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> or permit discovery … the court … may make such orders in regard to the failure as are just, and among others the following:
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> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence.
> 3.

[4] On appeal, Seidel argues that, while it had no duty to supplement discovery, the measurements in question were "critical" to their case, and the trial court erred by not admitting them. Seidel, however, ignores its argument before the trial court that the new measurements revealed that "nothing had changed." Thus, if Seidel's representation to the trial court was true, it was not prejudiced by the exclusion. *See* WIS. STAT. § 805.18(2) ("No judgment shall be reversed or set aside or new trial granted … on the ground of … the improper admission of evidence … unless … the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.").

complaint.[5] Strict liability and negligence are separate and distinct tort doctrines. *See* ***St. Clare Hosp. v. Schmidt***, 148 Wis. 2d 750, 757, 437 N.W.2d 228, 231 (Ct. App. 1989). While it is a species of negligence, under strict liability a plaintiff need not prove specific acts of negligence. *See* ***Dipple v. Sciano***, 37 Wis. 2d 443, 461, 155 N.W.2d 55, 64 (1967). Therefore, a defendant may be strictly liable for an injury, irrespective of whether the defendant used all reasonable care. *See* ***id***.

¶8 Defendants have a right to notice on how to defend a claim. *See* ***Studelska v. Avercamp***, 178 Wis. 2d 457, 463, 504 N.W.2d 125, 127 (Ct. App. 1993) ("this is a notice pleading state"); *see also* WIS. STAT. § 802.02 (Generally, a pleading shall contain "a short and plain statement of the claim, identifying the transaction or occurrence … out of which the claim arises and showing that the pleader is entitled to relief"). By not having pled strict liability, the City did not have notice that this would be an issue. The trial court did not err by not letting Seidel introduce evidence in support of a strict-liability claim.

D. *Res Ipsa Loquitur*

¶9 Seidel also claims that the jury should have been instructed on *res ipsa loquitur*. The doctrine of *res ipsa loquitur* permits a fact-finder to infer that negligence caused injuries when the following three conditions are satisfied:

> "(a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence, (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (c) the evidence offered is sufficient to remove the

[5] Seidel's complaint contained three causes of action: (1) negligence; (2) inverse condemnation; and (3) nuisance. The tanning company did not subsequently move to amend its complaint to add a strict liability cause of action.

> causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event."

Steinberg v. Arcilla, 194 Wis. 2d 759, 764, 535 N.W.2d 444, 445–446 (Ct. App. 1995) (citation omitted). "An instruction on *res ipsa loquitur* is not appropriate where there is 'substantial proof of negligence'—that is, where a mechanism of injury is shown." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 18, 496 N.W.2d 226, 229 (Ct. App. 1993) (citation omitted). In other words, before a plaintiff is entitled to such an instruction, the *res ipsa loquitur* needle must be threaded; namely, the plaintiff must show, absent negligence, that the claimed injury would not have ordinarily occurred *and* show there is no evidence as to any cause. If there is evidence of a cause, the plaintiff does not get a *res ipsa loquitur* instruction. Whether a jury should have been instructed on *res ipsa loquitur* is a question of law that we review *de novo*. *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167, 171 (Ct. App. 1992).

¶10 Clearly, *res ipsa loquitur* was not applicable in this case. Evidence of other potential causes of the building's settling and cracking was shown. The trial court correctly determined that "the use of res ipsa loquitur is inappropriate, finding: "The plaintiff's own expert, Dr. Christiansen, said that what we have here was incompetent soil under this building which caused some cracking and that this condition was accelerated by the water main breaks. So what he is saying is that there were two causes." In addition, Dr. Christiansen stated that other possible causes of the building's deterioration included: (1) vibrations caused by trucks routinely delivering supplies to the building's loading dock; (2) train traffic; and (3) the fact that the building's use was changed suddenly. Therefore, we conclude that the trial court properly determined that Seidel was not entitled to a jury instruction on *res ipsa loquitur*.

E. Jury Instructions

¶11 Finally, Seidel asserts that the trial court erred when it instructed the jury on damages and its failure to instruct on municipal nuisance. Specifically, Seidel argues that the jury should have been instructed in accordance with WIS JI CIVIL 1922, and, additionally, that the damage instruction should have reflected a calculation based on repair cost, rather than diminished value.[6] A trial court, however, has broad discretion in instructing the jury. *See* ***Fischer v. Ganju***, 168 Wis. 2d 834, 849, 485 N.W.2d 10, 16 (1992). We will uphold the trial court's decision to instruct the jury if the instructions, taken as a whole, correctly state the law. *See* ***id.***, 168 Wis. 2d at 850, 485 N.W.2d at 16. Again, Seidel has not provided a record for this court to review. In its reply brief, Seidel explains that the trial court's decision on what jury instructions to use was made in chambers and off the record.[7] As we have already stated, however, it is the appellant's burden to provide a record. Since no record is before us on this issue, we must

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[6] WIS JI–CIVIL 1922 provides:

> NUISANCE: MUNICIPALITY CREATING OR MAINTAINING
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> You are instructed that a municipality must so conduct and operate its business so as not to create or maintain a nuisance. A municipality, in the conduct of its business, is held to the same duty with regard to nuisances as any owner of private property or any operator of a private business.
>
> You are further instructed that legislative authority granted to a municipality to operate a business (operate a sewerage system) (operate a garbage disposal plant) does not permit such municipality to so operate such business so as to create or maintain a nuisance.

[7] Seidel filed a motion to expand the appellate record, requesting the inclusion of the jury-instruction transcript. The City, however, opposed the motion as untimely and prejudicial. We agreed with the City and denied the motion.

assume that the missing material supports the trial court's ruling. Accordingly, we affirm the trial court's decision on these issues.

By the Court.—Judgment affirmed.

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