COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1841 **Cir. Ct. No. 2008CV4246**

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

JOSEPH T. ESSER, II AND MARY ANN ESSER,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

DIANE C. HIGGINS,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed; cross-appeal dismissed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. A jury awarded Joseph and Mary Ann Esser $500,000 after finding real estate broker Diane Higgins negligent in her duties

toward them. The trial court then granted Higgins a new trial to consider the Essers' contributory negligence. Higgins prevailed. The Essers appeal the order denying their postverdict motion to set aside that verdict and their alternative motion for a new trial in the interest of justice. Higgins cross-appeals the order denying her motions to dismiss and for judgment notwithstanding the verdict after the first trial on the basis that the economic loss doctrine bars the Essers' negligence claim. We affirm on the appeal and dismiss the cross-appeal as moot.

¶2 In 2007, the Essers retained Higgins to sell their residence (Bay View). In their search for a new home, the Essers looked at over 100 lake properties with various brokers and ultimately became interested in one Higgins owned (Park Bay). The Essers claim that, to make Park Bay's $2,450,000 price tag affordable to them, Higgins agreed to forego her commission on the sale of Bay View, purchase via land contract another property (Maple Avenue) they owned, help them get a $200,000 line of credit, refund $100,000 of the Park Bay purchase price by paying them $4,000 a month for twenty-five months, and then buy Park Bay back at the purchase price, regardless of appreciation. They contended they were not concerned that all the agreements were not reduced to writing because they trusted Higgins as a friend. In the end, Higgins took her commission, did not purchase Maple Avenue, stopped paying the Essers after seventeen months, and did not buy back Park Bay. The Essers did not get the additional line of credit. Park Bay went into foreclosure.

¶3 The Essers filed suit, alleging that Higgins negligently performed her duties as a broker and breached the contract she signed to purchase Maple Avenue. The trial court denied Higgins' motion to dismiss the negligence claim on the basis of the economic loss doctrine.

¶4 At trial, the Essers' and Higgins' experts gave differing opinions as to whether the Essers were Higgins' clients or merely customers, whether Higgins employed impermissible unwritten "side agreements," whether Higgins' dual roles as owner and broker of Park Bay presented a conflict of interest, and whether Higgins provided brokerage services with reasonable skill and care.

¶5 Higgins' expert also opined that the Essers, who both have master's degrees, were "highly sophisticated investors" who have bought and sold seven or eight lakefront properties since 1993. He noted that Higgins nonetheless advised the Essers that brokers are legally prohibited from giving legal advice about a party's rights under an offer to purchase and recommended that they consult with an attorney.

¶6 The trial court denied Higgins' request to give a jury instruction and allow a verdict question on the Essers' contributory negligence. The jury found that Higgins was causally negligent, but did not breach the contract, and awarded the Essers $500,000 in damages. On motions after verdict, the trial court agreed with Higgins that it had erred in not allowing the contributory negligence instruction and jury question and set aside the verdict and granted Higgins a new trial on the issue of her negligence.

¶7 The second jury did not find Higgins negligent and, therefore, did not assess whether the Essers bore any fault. Arguing that the trial court erred in granting Higgins a new trial, the Essers moved for judgment notwithstanding the verdict. Alternatively, they sought an order setting aside the verdict and granting them a new trial in the interests of justice on the grounds that retrying Higgins' already-established negligence caused a miscarriage of justice. The trial court denied the motions, and the Essers filed this appeal.

¶8 The Essers do not challenge the availability of a contributory negligence defense. Rather, they contend that Higgins waived any objection to the special verdict and jury instructions. They assert that she failed to sufficiently state her objections to the jury instructions and to object at all to the lack of a contributory negligence question on the special verdict. We disagree.

¶9 "Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict." WIS. STAT. § 805.13(3) (2011-12)[1]; ***Gosse v. Navistar Int'l Transp. Corp.***, 2000 WI App 8, ¶19, 232 Wis. 2d 163, 605 N.W.2d 896 (1999). Grounds for the objection must be stated with particularity on the record. Sec. 805.13(3). Whether a waiver has occurred is a legal question subject to our independent review. ***LaCombe v. Aurora Med. Group, Inc.***, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532.

¶10 Higgins objected to the negligence question on the special verdict as being "too broad" because it did not specify the different duties a broker owes to clients as opposed to customers. She then argued that the jury should be read a contributory negligence instruction because the Essers failed to exercise ordinary care, and provided the court with a modified version of WIS JI—CIVIL 1007 defining contributory negligence.

¶11 Higgins' objection to the verdict, viewed in isolation, might have been more artfully stated. We are mindful, however, that the reason a particularized objection is required is to allow the trial judge an opportunity to correct or avoid errors. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

(1990). The transcript reflects the court's notation that the parties first engaged in off-the-record discussions, and the court then presented on the record the proposed special verdict questions before taking up the jury instructions. The objection to the failure to present contributory negligence to the jury was clear. In finding that Higgins had preserved her objections to both the verdict and the instructions, the trial court recognized that Higgins' overarching concern was that contributory negligence was not being presented to the jury, and it had the opportunity to rule on the matter.

¶12 Substantively, the Essers contend that the trial court erred in setting aside the verdict from the first trial and ordering a new trial on negligence. A trial court has the power to set aside a verdict and order a new trial when there are errors in the trial. WIS. STAT. § 805.15(1). An order for a new trial rests in the trial court's discretion and will not be set aside or reversed unless the trial court proceeded upon an erroneous view of the law or otherwise erroneously exercised its discretion. *See* ***Genge v. City of Baraboo***, 72 Wis. 2d 531, 534, 241 N.W.2d 183 (1976).

¶13 Higgins argued that the Essers were sophisticated real estate investors who, with their lender, were responsible for determining whether they could afford a particular property and that, if properly pled, contributory negligence is a valid defense in a professional negligence action. *See*, *e.g.*, ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 121, 362 N.W.2d 118 (1985). The trial court agreed that the evidence supported a contributory negligence instruction and question and that its failure to include them deprived the jury of the opportunity to fully consider the negligence issue. The court did not erroneously exercise its discretion.

¶14 The Essers next assert that the trial court erred in denying their motion to set aside the verdict and for a new trial in the interest of justice because, as the first jury already had determined Higgins' negligence, the court should have limited the second trial to contributory negligence, causation and damages.

¶15 A trial court's decision to deny a new trial in the interest of justice is reviewed for an erroneous exercise of discretion. ***Markey v. Hauck***, 73 Wis. 2d 165, 171-72, 242 N.W.2d 914 (1976). The scope of a new trial also is discretionary with the trial court because that court is in a better position than a reviewing court to decide the relationship of the issues tried. *See* ***Badger Bearing, Inc. v. Drives & Bearings, Inc.***, 111 Wis. 2d 659, 673, 331 N.W.2d 847 (Ct. App. 1983). This court does not look for evidence to sustain the jury's findings, but for reasons to sustain the trial court. ***Larry v. Commercial Union Ins. Co.***, 88 Wis. 2d 728, 733, 277 N.W.2d 821 (1979). Here, the trial court awarded Higgins a new trial on both negligence and contributory negligence so that the jury could fully consider and resolve the negligence claim. It denied the Essers' motion for a new trial because the verdict in the second trial found sufficient support in the evidence. One reason is sufficient for us to uphold the trial court's order. ***Hillstead v. Shaw***, 34 Wis. 2d 643, 648, 150 N.W.2d 313 (1967), *abrogated on other grounds by* ***Westfall v. Kottke,*** 110 Wis. 2d 86, 328 N.W.2d 481(1983).

¶16 No costs to either party.

By the Court.—Orders affirmed; cross-appeal dismissed.

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