COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP49 **Cir. Ct. No. 2012CV577**

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

CHELSEA L. BETZ, BY HER GUARDIAN AD LITEM, JOEL LARIMORE, JAMES BETZ AND KELLI BETZ,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed; Cross-appeal dismissed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Chelsea Betz and her parents, James Betz and Kelli Betz (collectively the Betzes), appeal a judgment dismissing their negligence claims against West Bend Mutual Insurance Company (West Bend). The

judgment was entered following a jury verdict finding that Hannah Nielsen did not cause injuries sustained by Chelsea when she fell from a tree in which the two girls were playing. We conclude the special verdict answer regarding causation was supported by reasonable inferences drawn from the evidence at trial. In addition, we conclude the verdict answer was not contrary to the great weight and clear preponderance of the evidence so as to entitle the Betzes to a new trial in the interest of justice. Accordingly, we affirm.

BACKGROUND

¶2 Chelsea was injured when she fell from a tree while at the residence of Christine and Ryan Nielsen, Hannah's parents, in August of 2011. The Betzes filed a direct action lawsuit against West Bend, the Nielsens' insurer, on June 12, 2012. They alleged that Chelsea's injuries occurred as a result of Christine's and Ryan's negligent supervision. The Betzes later amended the complaint to include allegations that the Nielsens' ten-year-old daughter, Hannah, was also negligent. The case was tried to a jury.

¶3 At trial, Hannah testified she and Chelsea, who at the time was also ten years old, climbed high into a tree to play a game in which they threw branches or twigs down on their younger brothers. Chelsea was standing on one branch while holding another branch with both hands. Hannah grabbed a small offshoot of the branch Chelsea was holding and bent it. Chelsea's hands were near the tree trunk, while the offshoot was down the limb away from the trunk. Hannah stated that she intended to break off the smaller branch, and that similar branches broke off easily and without much effort. Hannah was not trying to break off the larger limb Chelsea was holding. Nonetheless, Hannah testified that

she "was trying to break the [twig] off, and the other branch broke that … Chelsea was holding onto." Chelsea fell and suffered serious injuries.

¶4 Chelsea testified she was playing with Hannah when Hannah suggested they play a game "like war" in which they dropped pine needles and twigs on the boys. Chelsea confirmed they climbed "pretty high up" in the tree, and that they were "breaking off some twigs" that were roughly the diameter of a pen and snapped off "pretty easy." The limb Chelsea was holding broke close to the tree truck. At the time of trial, the last thing Chelsea could remember about her fall was dropping branches from the tree. She could not remember the branch breaking or her fall.

¶5 Following the close of evidence, the Betzes filed a motion for a directed verdict, asserting that Hannah was causally negligent as a matter of law. The court withheld a decision on the motion and submitted the case to the jury. After the court instructed the jury on the applicable standards, the jury returned the following special verdict, in relevant part:

> 1. At or immediately prior to the fall on August 25, 2011, was Hannah Nielsen negligent?
>
>   Answer: Yes.
>
> 2. If you answered Question 1 "yes", then answer this question: Was such negligence a cause of Chelsea Betz's injuries?
>
>   Answer: No.

The jury also found Chelsea negligent, but, like Hannah, not causally so.

¶6 The Betzes then renewed their motion for a directed verdict under WIS. STAT. § 805.14(5)(d).[1] The motion also invoked § 805.14(5)(c) and requested, as an alternative, that the court change the jury's answer to Question 2 of the special verdict, with respect to whether Hannah was causally negligent, from "no" to "yes." Further, and again in the alternative, the Betzes requested a new trial in the interest of justice pursuant to WIS. STAT. § 805.15(1), asserting the verdict was contrary to the weight of the evidence.

¶7 The court issued a written order denying the Betzes' motion. It concluded there was sufficient evidence on which the jury could base a conclusion that Hannah was not causally negligent, reasoning that there was no clear testimony attributing the fall to Hannah's conduct; Hannah was not reaching for the limb Chelsea was holding, but rather an offshoot; and the jury could have found Hannah's other conduct (such as climbing the tree in the first place) negligent but not causally so. Because there were numerous reasonable inferences that could be drawn from the evidence, the court also concluded the jury verdict was not contrary to the weight of the evidence. The Betzes appeal, and West Bend cross-appeals.[2]

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

[2] The jury completed the special verdict's damages questions and awarded $800,000 in future medical expenses. West Bend cross-appeals, challenging the sufficiency of the evidence to support this award. Because we conclude the trial court properly denied the Betzes' motion, thereby denying the Betzes any recovery, we need not determine whether the jury award was supported by sufficient evidence. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts should decide cases on the narrowest possible grounds).

DISCUSSION

¶8 The Betzes must overcome a high burden to have the judgment reversed following a jury verdict. Their challenges to the judgment under WIS. STAT. § 805.14(5) are essentially challenges to the sufficiency of the evidence. *See* ***Legue v. City of Racine***, 2014 WI 92, ¶137, 357 Wis. 2d 250, 849 N.W.2d 837 ("A motion for a directed verdict challenges the sufficiency of the evidence."); ***Kovalic v. DEC Int'l, Inc.***, 161 Wis. 2d 863, 873 n.7, 469 N.W.2d 224 (Ct. App. 1991) (motion to change the jury's answer challenges the sufficiency of the evidence to sustain the answer). No motion challenging the sufficiency of the evidence can be granted unless, "considering all credible evidence and reasonable inferences therefrom in the light more favorable to the party against whom the motion is made, there is no credible evidence" to support the verdict. WIS. STAT. § 805.14(1).

¶9 The Betzes contend there was no credible evidence supporting the jury's causation finding. Causation is determined by assessing whether the negligence was a substantial factor in contributing to the result. ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458, 267 N.W.2d 652 (1978). "The phrase 'substantial factor' denotes that the defendant's conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense." ***Id.*** at 458-59. Causation is often an inference the trier of fact is to draw from the circumstances. ***Id.*** at 459.

¶10 The Betzes argue the only reasonable inference the jury could draw from the evidence was that Hannah caused Chelsea's fall. The keystone of the Betzes' argument is the timing of the breakage. They note the limb Chelsea was

holding broke only after Hannah made contact with its small offshoot. In the Betzes' view, the jury was required to infer the branches were hard to break; Hannah exerted significant effort in trying to break them; and Hannah's efforts produced a "leveraged pull that caused the breakage of the main limb." The Betzes sum up their argument by stating "the jury was dead wrong on the causation answer based on the credible evidence, logic and the rules of gravity known to all laypersons."

¶11 We conclude there were reasonable inferences from the credible evidence to support the jury's causation finding. There was scant direct evidence at trial regarding how the fall occurred. Chelsea could not remember the accident; Hannah simply testified that the limb Chelsea was holding broke. There was no expert testimony attempting to reconstruct the accident or opining about the cause of the main limb's breakage.

¶12 The case therefore turned on reasonable inferences from the evidence. The jury would have been entitled to accept the inferences the Betzes propose and find that Hannah's efforts to break the offshoot caused the main limb to break. However, the jury was equally entitled to infer the limb supporting Chelsea broke for some reason unrelated to Hannah's conduct. As just one example, the jury could have reasonably inferred that Hannah's efforts to break the offshoot played an insignificant role and Chelsea simply exerted too much force on the limb she was holding. "[I]t is for the jurors, not for us, to determine 'what seems to them to be the most reasonable inference.'" ***State v. Abbott Labs.***, 2012 WI 62, ¶71, 341 Wis. 2d 510, 816 N.W.2d 145 (quoted source omitted).

¶13 The Betzes contend that any alternative causation theory is entirely speculative and cannot form the basis for a jury verdict. *See* ***General Star Indem.***

Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc., 215 Wis. 2d 104, 122, 572 N.W.2d 881 (Ct. App. 1997) (jury cannot base its findings on speculation or conjecture). We disagree because the evidence allowed fair-minded jurors to draw different, reasonable inferences. *See* ***Abbott Labs.***, 341 Wis. 2d 510, ¶71. Again, there was no direct testimony about the cause of Chelsea's fall, so even the Betzes' causation theory required the jury to draw its own conclusions about what happened.

¶14 The Betzes' efforts to invoke logic and the law of gravity in support of their appellate argument are unavailing. It was not illogical for the jury to accept one of several competing inferences that could be reasonably drawn from the trial evidence. Further, gravitational forces have little to do with causation in this case. No one disputes Chelsea fell from the tree or that gravity brought her to the ground; the question is how and why the fall occurred in the first instance. Although it is largely undisputed that Hannah touched the offshoot, there was no evidence that Hannah's conduct caused the breakage of the main limb.

¶15 The Betzes also argue, largely for the same reasons as above, that they are entitled to a new trial in the interest of justice. They reason that even if the evidence was sufficient to sustain the jury's finding of no causation, the jury's answer to the causation question was nonetheless contrary to the great weight and clear preponderance of the evidence. "A trial court has wide discretion to order a new trial in the interest of justice if the verdict is against the great weight and clear preponderance of the evidence, although the evidence is not so insufficient as to justify changing the answers to the special verdict questions." ***McPhillips v. Blomgren***, 30 Wis. 2d 134, 139, 140 N.W.2d 267 (1966); *see also* ***DeGroff v. Schmude***, 71 Wis. 2d 554, 563, 238 N.W.2d 730 (1976) (noting specifically that rule applies to causation questions).

¶16 We owe great deference to the court's decision to grant or deny a motion for a new trial under WIS. STAT. § 805.15(1). *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). The trial court is in the best position to observe and evaluate the evidence. ***Id.*** We look for reasons to sustain the trial court's determination, and we will not reverse it as long as the court set forth a reasonable basis for its decision. ***Id.***

¶17 Here, the court properly concluded the jury verdict was not contrary to the great weight and clear preponderance of the evidence. The Betzes' causation case was based on inference; there was no direct evidence that Hannah caused the limb to break. Although that was one permissible inference from the testimony, we cannot say that inference was so compelling that the jury erred in reaching the opposite conclusion.

¶18 West Bend is allowed WIS. STAT. RULE 809.25 costs on appeal. No costs are allowed with respect to West Bend's cross-appeal.

By the Court.—Judgment affirmed; Cross-appeal dismissed.

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