COURT OF APPEALS DECISION DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1191

Cir. Ct. No. 2013SC9481

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

CLIFF METROPOLITAN PLACE APARTMENTS, LLC,

PLAINTIFF-RESPONDENT,

V.

PARISI CONSTRUCTION CO., INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] After a trial to the circuit court in this small claims action, the court found that Parisi Construction Co., Inc. negligently caused damage to the terrace area between the street and sidewalk adjacent to property

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

owned by Cliff Metropolitan Place Apartments, LLC. The court found that Metropolitan Place incurred costs totaling $6,700 to repair the terrace area, and ordered Parisi to pay Metropolitan Place $6,700 in damages. Parisi appeals, arguing that the circuit court erred in finding that Parisi was liable for negligently causing damage to the terrace area, in awarding $6,700 in damages, and in failing to consider whether public policy precluded liability. For the reasons stated below, I reject Parisi's arguments and affirm the judgment.

BACKGROUND

¶2 Cliff Metropolitan Place Apartments, LLC owns commercial property with frontage on Broom Street in Madison, Wisconsin, and is responsible for maintaining the terrace area between the road and sidewalk adjacent to its property. Cliff Fisher owns Cliff Metropolitan Place Apartments, LLC.

¶3 Four witnesses testified at the trial to the court: Cliff Fisher, the contractor Fisher hired to repair the terrace area, a City of Madison construction inspector, and the Parisi project manager for the road construction project at issue. They testified in pertinent part as follows.

¶4 Fisher testified that some time before 2010, he had placed pavers in the Metropolitan Place terrace area in order to prevent the area from turning to mud. These pavers were concrete blocks with holes cut out of their centers, in which grass grew. The grass sat below the concrete so that persons who walked across the pavers were walking on the concrete even as the grass was growing. Fisher had the pavers stained green "so that it looked like grass also so when you looked down the street it was nice and green looking."

¶5 In 2010, Parisi undertook a road construction project along Broom Street for the City of Madison. Fisher testified that grass was growing in the pavers before Parisi began work on the project. He testified that he saw Parisi workers place gravel and pipes on the terrace area, that he saw Parisi workers drive big end loaders on the terrace area to scoop up loads of gravel and pick up pipes placed there, and that in driving over the terrace area the end loaders cracked the pavers. He testified that after Parisi completed the project, the grass did not grow back. He referred to photographs taken in spring 2013, which he stated accurately reflected the condition of the terrace area after Parisi completed the project, with no grass growing and cracked pavers.

¶6 Fisher testified that he contacted the city in spring 2011 about reseeding and fixing the damage to the pavers, and that he also complained to Parisi. Fisher testified that he told the city inspector about the appearance of the terrace area, that grass was not growing, and that there were broken pavers. He did not hear back from Parisi, and did not see Parisi workers return to the property to replace the pavers or the grass. When he did not hear back from Parisi and saw that nothing was being done to repair the terrace area, Fisher retained a contractor to repair the terrace area in June 2013.

¶7 On cross-examination, Fisher, when shown photographs that were taken the day before trial in May 2014, testified that most of the pavers by the driveway were broken because of garbage trucks driving over them. Fisher also testified that the 2013 photographs taken before the terrace area was repaired showed only a few cracked pavers, that the weeds obscured the cracks, and that the pavers that were not cracked were reused. On redirect examination, he testified that approximately one-fourth of the pavers were damaged and not reused. He testified that all the pavers had to be removed, not only those that were

damaged, because the pavers were uneven after Parisi's construction equipment drove over them due to there being a sand base beneath the pavers and the equipment pushing the pavers into the ground.

¶8 The contractor Fisher retained to repair the terrace area testified that when he went to the site to do the work, the grass was dead, some pavers were in disarray, some were broken in half, some were cracked, and the terrace area was uneven compared to the sidewalk and the curb. The contractor testified that there was a lot of gravel packed into the pavers, to the point that nothing would grow in them. The contractor testified that he tried to reuse as many pavers as possible, and that it took one week, with seven people working, to complete the job. As part of their job, they pulled out all of the pavers because the pavers were uneven. They compacted the ground so that it was level and even with the sidewalk and curb. They removed each paver, and re-installed the pavers that were not damaged after cleaning the pavers and removing the debris packed in the holes. They replaced one-quarter of the pavers, and cleaned and re-installed the rest.

¶9 The city inspector testified that she was aware of the condition of the Metropolitan Place terrace area before Parisi commenced work on the 2010 road construction project, and that the grass was green and growing and the pavers were in good shape. She testified that Cliff Fisher called her and told her "that he was not happy with the terrace work in front of his address," and that he mentioned specifically the grass had died and needed to be reseeded and replanted and there was damage to the pavers. She testified about emails, dating from November 2010 to June 2011, between the city and Parisi about reseeding the terrace area and attending to pavers, and that she understood Parisi would address the problems in the spring. She testified that she never received a phone call from

Parisi saying they were coming to take care of it, and never received confirmation from Parisi that they did so.

¶10 The Parisi project manager for the 2010 road construction project testified that Parisi received from the city a certificate of substantial completion, meaning that the project and any outstanding items identified by the city were completed, in September 2010. He testified that the outstanding items included replacing pavers damaged during the road construction project along the curb and gutter, as part of the work necessary for the contract. He testified that the outstanding items also included replacing pavers damaged outside the scope of the contract, and that these pavers were in areas other than the Metropolitan Place terrace area.

¶11 The circuit court found that Parisi caused damage to the pavers and grass in the terrace area during the 2010 road construction project, and that the cost Metropolitan Place incurred to repair the damage was reasonable. The court ordered judgment in favor of Metropolitan Place in the amount of $6,700.

DISCUSSION

¶12 Parisi argues that the circuit court erroneously found that Parisi was liable for negligently causing damage to the Metropolitan Place terrace area and erroneously awarded $6,700 in damages. Parisi also argues that the circuit court erroneously failed to consider whether public policy precluded liability. I address and reject each of Parisi's arguments in turn.

A. Standard of Review

¶13 "As a general rule, negligence is a jury question." ***Morgan v. Pennsylvania General Ins. Co.***, 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979).

Here, where the question of negligence was decided after trial to the court, the standard of review is well established:

> Findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979) (citations omitted). In short, we will not set aside a fact found by the circuit court unless the record shows it to be clearly erroneous—meaning that, after accepting all credibility determinations made and reasonable inferences drawn by the fact-finder, the great weight and preponderance of the evidence supports a contrary finding. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983). The standard for reversal is heavily weighted on the side of sustaining circuit court findings of fact in cases tried without a jury. ***Leimert v. McCann***, 79 Wis. 2d 289, 296, 255 N.W.2d 526 (1977).

¶14 Parisi acknowledges this standard of review in its initial brief, but argues in its reply brief that whether Metropolitan Place met its burden of proof as to its claim of negligence is a question of law that this court reviews de novo.

However, the case that Parisi cites in support of its argument is inapposite.[2] Because its argument as to standard of review is otherwise undeveloped, and raised for the first time on reply, I do not address it further. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[a]rguments unsupported by legal authority will not be considered"); ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) ("We will not, as a general rule, consider arguments raised for the first time in a reply brief ....").

B. Sufficient Evidence to Support Finding of Negligence

¶15 In order to prove negligence, a plaintiff must establish: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the defendant's breach and the plaintiff's injury; and (4) actual loss or damage resulting from the injury. ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. Parisi argues that Metropolitan Place "did not provide sufficient evidence to ... show that Parisi breached its duty, caused an injury, or actual loss resulting from the injury." I conclude that the record contains ample evidence to support the circuit court's finding that Parisi negligently caused damage to the Metropolitan Place terrace area.

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[2] Parisi cites ***Becker v. State Farm Mut. Auto. Ins. Co.***, 141 Wis. 2d 804, 811, 416 N.W.2d 906 (Ct. App. 1987), for its statement that "[w]hether a party has met its burden of proof is a question of law." However, this court makes that statement with reference to the claim in that case "that the proofs establish liability as a matter of law [which] is, in essence, a claim that the burden of proof, as a matter of law, has been met." ***Id.*** The circuit court here did not find, and Metropolitan Place did not ask it to find, negligence as a matter of law. Rather, the question of negligence that was tried to the circuit court in this case was one of fact, and it is the circuit court's set of factual findings that Parisi asks us to review on appeal, based on, in Parisi's own words, whether Metropolitan Place "provide[d] sufficient evidence."

¶16 "[A] duty of care[] is established ... whenever it was foreseeable to the defendant that his or her act or omission to act might cause harm to some other person." ***Id.***, ¶20. Parisi does not seriously argue that it did not have a duty to owners of property adjacent to the road construction project, to avoid damaging their property, or that placing heavy material such as piles of gravel and piping, and operating heavy end loaders, on adjacent property might not damage that property. Rather, Parisi argues that the circuit court did not expressly find that Parisi did not exercise ordinary care, and that the evidence does not show, and the circuit court did not find, that Parisi damaged the Metropolitan Place terrace area. As explained below, the record does not support Parisi's argument.

¶17 After the parties concluded their presentation of evidence, the circuit court ruled as follows:

> [T]he question for me is whether the greater weight of the credible evidence supports Metropolitan's claim here, the plaintiff's claim. And "by the greater weight" is meant whether the evidence that is believed has greater weight or more weight in support of the proposition, in this case Parisi's liability for this than the credible evidence against it.
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> And my conclusion is that it does and that the most credible explanation for the damage in the pavers and the failure of grass to return to that area was incidental damage caused by Parisi during the construction project. The photographs in Exhibit 1 that show what the project looked like two years — in 2013 when the replacement was started show a largely weedy area with bare spots interspersing the weeds and I think the testimony was credible.
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> ....
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> ... [T]he fact is that [Fisher] was damaged. There was terrace material that he had installed at his expense and that was damaged and had to be replaced to restore the terrace to the condition that it was in before the project was begun.

¶18 While the circuit court did not expressly identify the duty of care, implicit in the court's decision is the finding that it could be reasonably foreseen that placing large amounts of gravel and piping, and operating heavy end loaders, on the terrace area might damage the grass and pavers underneath. *See* ***State v. Berggren***, 2009 WI App 82, ¶18, 320 Wis. 2d 209, 769 N.W.2d 110 ("when the record does not include a specific finding on an issue, ... [an appellate court] will assume that the issue was resolved by the [circuit] court in a manner which supports the final judgment"). As to whether Parisi breached that duty, the circuit court expressly found that Parisi caused the damage to the pavers and grass in the terrace area during the construction project. That finding is supported by uncontroverted evidence that the pavers and grass were damaged, and that Parisi performed acts that caused that damage during the 2010 road construction project.

¶19 That evidence includes: Fisher's testimony that he saw Parisi workers place gravel and piping on the terrace area and damage the pavers and grass while operating heavy end loaders on the terrace area during the road construction work in 2010, and that the grass never grew back; the city inspector's testimony and emails showing that Fisher complained about the damage to the grass and pavers caused by the Parisi workers in the spring of 2011; the city inspector's testimony about the condition of the terrace area before the road construction project began in 2010; and Fisher's contractor's testimony about the condition of the terrace area before he began the repair work in 2013.

¶20 To counter this evidence, Parisi points to the city inspector's and the Parisi project manager's testimony about the punch list of outstanding items, and infers from that testimony that if the Metropolitan Place pavers were damaged, they would have been on the punch list and repaired because Parisi "completed all items on the punch lists and completed the City Contract." Parisi also points to the

absence of corroborating evidence showing the condition of the terrace area immediately before and after the 2010 road construction project was undertaken.

¶21 As summarized above, most of the evidence supporting the circuit court's findings was unrefuted. That there may be some contrary evidence, or contrary inferences from the evidence, does not render the evidence supporting the circuit court's findings insufficient, or the court's findings erroneous. The circuit court is the "ultimate arbiter" for credibility determinations when acting as a fact-finder, and this court will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2) ("due regard shall be given to the opportunity of the [circuit] court to judge the credibility of the witnesses"). The evidence identified above suffices to support the circuit court's finding that, during the 2010 road construction project, Parisi caused the damage to the Metropolitan Place terrace area, which Metropolitan Place repaired in 2013.

C. Reasonableness of Damages Award

¶22 Parisi argues that the circuit court erroneously awarded the full cost of the repairs to the terrace area without considering whether all the pavers needed to be replaced or whether the damages award should be discounted for depreciation. I reject Parisi's arguments because the circuit court's decision itself establishes that its award was reasonable based on the evidence in the record.

¶23 "In reviewing damage awards granted in either a bench or jury trial this court does not substitute its judgment for that of the fact finder, but rather determines whether the award is within reasonable limits." ***Cords v. Anderson***, 80

Wis. 2d 525, 552-53, 259 N.W.2d 672 (1977). The circuit court explained its award of the total cost of repair of $6,700, as follows:

> [T]he number of pavers and the square footage of pavers that were replaced by Mr. Fisher where they actually replaced them and didn't reuse existing ones that Parisi had already provided is a reasonable amount and a fraction of the total area that was involved which to me lends credibility to the argument that they did only what was necessary to repair damage and tried to keep the cost of that repair to a reasonable amount.

¶24 The reasonableness of the court's award is supported by Fisher's and his contractor's testimony explaining that all the pavers had to be removed and the sand below evened out, that one-quarter of the pavers were damaged and replaced by new pavers, and that the remaining pavers were cleaned and reused. Parisi's contention that the court did not consider whether all the pavers had to be replaced is not accurate, and Parisi's contention that the court did not consider depreciation fails because Parisi did not present any evidence about depreciation for the court to consider. In sum, Parisi fails to show that the award of $6,700 was unreasonable.

D. Public Policy Considerations

¶25 There are instances in which public policy may preclude liability notwithstanding the presence of all the elements of a negligence claim. *See* ***Alwin v. State Farm Fire & Cas. Co.***, 2000 WI App 92, ¶12, 234 Wis. 2d 441, 610 N.W.2d 218. The factors to consider on a case-by-case basis are whether: (1) the injury is too remote from the negligence; (2) the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect, it appears too highly extraordinary that the negligence should have brought about the harm; (4) recovery would place too unreasonable a burden on the negligent tortfeasor; (5)

allowing recovery would be too likely to open the way for fraudulent claims; or (6) allowing recovery would open a field having no sensible or just stopping point. ***Id.***

¶26 Parisi faults the circuit court for not considering these factors so as to preclude liability here. I do not address Parisi's argument, because Parisi failed to make it before the circuit court.[3] *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) ("We normally will not review an issue raised for the first time on appeal.")

CONCLUSION

¶27 Sufficient trial evidence supports the circuit court's finding that Parisi negligently caused damage to the Metropolitan Place terrace area and to support the circuit court's award of $6,700 in damages. Accordingly, I affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[3] In its statement of issues, Parisi represents that the circuit court did "consider public policy when imposing liability." However, I discern and Parisi points to no instance in the record where the circuit court did so, nor where Parisi asked the court to do so.