COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1551 **Cir. Ct. No. 2011CV501**

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

JOHN FIRKUS,

PLAINTIFF-RESPONDENT,

V.

GENE DIXON TELFER AND HELENVILLE MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

BLUE CROSS BLUE SHIELD OF MINNESOTA, INC. AND MICHAEL FOODS, INC. P/K/A USABLE LIFE,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. In June 2008, John Firkus hurt his leg when he fell through precast concrete steps in front of a house that he rented from Gene Telfer. Firkus filed suit against Telfer and his insurer, Helenville Mutual Insurance Company (collectively, Telfer), claiming that Telfer was negligent in the inspection and maintenance of the rental property, and that Telfer's negligence caused Firkus's injuries and damages. Telfer appeals a judgment entered after a jury trial in favor of Firkus. The only issue on appeal is whether the circuit court was clearly wrong in changing the special verdict answer on cause from "No" to "Yes." We agree with the circuit court that no credible evidence supported the jury's answer that Telfer's negligent inspection and maintenance of the rental property was not a cause of Firkus's injuries, and we therefore affirm the judgment entered by the circuit court.

BACKGROUND

¶2 The relevant facts, presented through testimony at trial by Telfer, Firkus, Firkus's fiancée, and Firkus's property management expert are undisputed.

¶3 In 1977, Telfer purchased and placed a prefabricated home on his farm property, and purchased and placed a set of precast concrete steps at the front of the home. At the time of installation, Telfer knew that the steps were hollow and topped with a slab of concrete about an inch thick. Telfer rented the home to a number of tenants. Telfer never inspected the rental property or looked for dangerous conditions at the property. Telfer had not walked on or looked at the steps since 1994, and had not repaired or replaced the steps since he installed them in 1977.

¶4 In 2005, Telfer rented the property to Firkus and his fiancée. Firkus testified that when they moved in the front steps had cracks in them, and that the

cracks were the same then as the cracks visible in the photograph taken immediately after Firkus's fall in 2008. Firkus's fiancée testified that she noticed the cracks after they moved in, and that the cracks in the steps when they moved in were the same as the cracks visible in the photograph. The cracks did not appear to worsen between the time when Firkus and his fiancée moved in, in 2005, and the time when Firkus fell through the steps, in 2008. Firkus and his fiancée did not tell Telfer about the cracks because they believed that the steps were solid concrete. If they had known when they moved in that the steps were hollow, they would have told Telfer about the cracks.

¶5 In June 2008, Firkus was walking down the front steps when the second step collapsed under his foot. Firkus's left leg went all the way through the step to the ground, resulting in injuries to his left knee.

¶6 Telfer knew that cracks in the hollow, precast concrete steps would be dangerous, and had he seen the cracks he would have investigated to see if the steps needed to be replaced or fixed. Telfer testified, "if they [the steps] checked out to be bad enough, I would have replaced" them.

¶7 Firkus's expert testified that in order to properly maintain rental property, a landlord should inspect the property at least two times per year, as well as prior to a new tenant moving in, so that the landlord can address small problems before they become big problems. Here, according to the expert, had Telfer regularly inspected the steps, he would have identified the cracks as a potential hazard and, knowing that they were hollow, he should have repaired or replaced the steps. The expert testified that because the cracks were there when Firkus moved in, Telfer should have replaced the steps before Firkus moved in.

¶8 After closing arguments at trial, the circuit court gave WIS JI—CIVIL 8020 Duty of Owner or Possessor of Real Property to Nontrespasser User; the standard instruction defining negligence, WIS JI—CIVIL 1005 Negligence; and the standard instruction on cause, WIS JI—CIVIL 1500 Cause.

¶9 The following are the terms of the instructions given:

> An owner of a property must use ordinary care under the existing circumstances to maintain his or her premises to avoid exposing persons on the property with consent to an unreasonable risk of harm....
>
> ... In performing this duty, an owner of the premises must use ordinary care to discover conditions or defects on the property which expose a person to an unreasonable risk of harm.
>
> If an unreasonable risk of harm existed and the owner was aware of it, or if in the ... use of ordinary care he should have been aware of it, then it was his duty to either correct the condition or danger or warn other persons of the condition or risk as was reasonable under the circumstances.
>
> ....
>
> A person is negligent when he fails to use or exercise ordinary care. Ordinary care is the care ... which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent if the person without intending to do harm fails to do something that a reasonable person would recognize as creating an unreasonable risk of injury or damage to person or property.
>
> ....
>
> In answering [question two] you must decide whether someone's negligence caused John Firkus' injury. This question does not ask about the cause, but rather a cause, because an injury may have more than one cause. Someone's negligence caused the accident if it was a substantial factor in producing the injury.

¶10 The questions on the special verdict and the jury's answers were as follows:

> QUESTION NO 1 On or prior to June 28, 2008, was Defendant Gene Dixon Telfer negligent in inspecting and maintaining the rental property ...?
>
> ANSWER Yes
>
> QUESTION NO 2 If you answered Question No. 1 "yes", then answer this question. Was Defendant Gene Dixon Telfer's negligence a cause of injuries to Plaintiff John Firkus?
>
> ANSWER No
>
> QUESTION NO 3 On or prior to June 28, 2008, was the Plaintiff, John Firkus, negligent?
>
> ANSWER No

¶11 Firkus filed a motion to change the answer to Question Number 2, as to cause, from "No" to "Yes." The circuit court granted the motion after briefing and a hearing, stating:

> I think the cause question ... would go to whether or not somebody who was obligated and had a duty to inspect or maintain the duty to inspect or maintain was a cause of the person's subsequent injury....
>
> But [Telfer] ... never inspected and he never maintained, so it was bound to happen at some point in time anyway. If the – if the mechanism of injury is that we all accept it, it was going to happen, because [Telfer] never maintained, so, therefore, it had to be a cause as a matter of law....
>
> ….
>
> ... [T]here's no evidence in the record to support a no answer; therefore, the answer has to be yes.

¶12 The circuit court then entered an order for judgment and a judgment in favor of Firkus. Telfer appeals.

DISCUSSION

¶13 Firkus filed a motion asking the court to change the jury's finding, that Telfer's negligence was not a cause of the injuries that Firkus sustained when he fell through the precast concrete step, "because there was no credible evidence admitted at trial to sustain such a finding by the jury."[1] In this appeal, Telfer argues that the circuit court erroneously granted the motion because credible evidence did sustain the jury's finding that Telfer's negligence was not a cause of Firkus's injuries. As we explain below, Telfer's argument fails because he does not point to any credible evidence presented at trial that would support the challenged answer under any reasonable view or any reasonable inferences.

¶14 Relying on case law from one hundred years ago, the Wisconsin Supreme Court set forth the standard of review that applies to a motion to change a jury's answer in ***Lueck v. City of Janesville***, 57 Wis. 2d 254, 204 N.W.2d 6 (1973). The court explained:

> We are mindful of the often stated rule that if there is any credible evidence under any reasonable view or any reasonable inferences derived therefrom that support a finding of fact by the jury[,] that neither [the circuit] court nor this court should change that answer. Conversely it can be said if there is no such evidence either court can change the answer as a matter of law.

[1] Firkus filed the motion pursuant to WIS. STAT. § 805.14(5)(b) and (c). Only subsection (c) is the proper basis for Firkus's motion. *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶42 and n.12, 340 Wis. 2d 307, 814 N.W.2d 419 (explaining that a motion to change the answer in the verdict because the movant does not accept the finding of the verdict as true, is properly brought under subsec. (c)). Under WIS. STAT. § 805.14(5)(c), "[a]ny party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer."

Lueck, 57 Wis. 2d at 262 (citing ***Thorp v. Landsaw***, 254 Wis. 1, 8, 35 N.W.2d 307 (1948), which in turn cites ***Behling v. Wisconsin Bridge & Iron Co.***, 158 Wis. 584, 589, 149 N.W. 484 (1914)); *see also* ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 229-30, 270 N.W.2d 205 (1978). That standard of review still applies:

> In reviewing a circuit court's decision to grant such a motion, an appellate court will search for credible evidence to sustain the jury's verdict. The appellate court will overturn the circuit court's decision if the circuit court was "clearly wrong." A circuit court's decision to change the jury's answer is "clearly wrong" if the jury verdict is supported by "any credible evidence."

Best Price Plumbing, Inc. v. Erie Ins. Exch., 2012 WI 44, ¶44, 340 Wis. 2d 307, 814 N.W.2d 419 (citations omitted). "[W]e evaluate the evidence in the context of the instructions that were given to the jury." ***Id.***, ¶42.

¶15 Telfer argues that there are two ways in which the jury's finding that Telfer's negligence was not a cause of Firkus's injuries is supported by certain inferences from the credible evidence. First, Telfer points to his testimony that he "looked over the wheel of the lawnmower" when he mowed the lawn every ten days and drove right by the steps. Telfer argues that the jury could have relied on this testimony to find that Telfer was attentive enough to the danger inherent in the hollow steps to have observed the cracks. However, Telfer further argues, the jury would have concluded that, either: (1) the cracks significantly worsened before Telfer had a chance to attend to the steps; or (2) the cracks did not significantly worsen, but Firkus fell before Telfer had a chance to attend to the steps. Alternatively, Telfer argues that the jury could have found that if he had conducted semiannual inspections, Firkus could have fallen for the same reasons, either because after an inspection "the condition of the steps could have significantly

worsened and led to" Firkus's fall, or because the cracks did not significantly worsen but Firkus fell before Telfer could fix them. Therefore, Telfer asserts, Firkus would have fallen even if Telfer had not been negligent in his inspection and maintenance of the property.

¶16 Telfer's arguments fail in several respects. His first argument based on his periodic mowing of the property relates to negligence, not to cause. Had the jury found that the periodic mowing constituted adequate inspection, it would not have found Telfer negligent for failing to inspect and maintain the rental property. Therefore, the foundation for the inferences on which Telfer bases his first "credible evidence" argument do not exist.[2]

¶17 Nor is there any credible evidence to support the inferences Telfer posits for his alternative argument. Telfer points to no evidence supporting his suggestion that the cracks significantly worsened after Telfer should have inspected and before Firkus fell. Firkus testified that the cracks were the same when he fell and when he moved in two and one-half years earlier. Firkus's fiancée testified that she noticed the cracks after they moved in, and that the steps did not appear to get worse while they lived there. Firkus's expert testified that while he lacked expertise to opine as to the "progression of any cracking in these steps," the cracks as they existed in 2005 were a potential hazard then, which

[2] Moreover, Telfer's own testimony refutes his suggestion that his periodic mowing "gave him the opportunity to observe a serious crack in the step that would have needed replacement." Telfer testified that he never inspected the rental property, he had not looked at the steps for at least fourteen years before Firkus fell, and when he was mowing he was not "looking, ... inspecting, ... or making sure everything was okay." Telfer also repeatedly testified regarding what he would have done had he seen the cracks in the steps, indicating that he never saw the cracks even when mowing. Thus, it would not have been reasonable for the jury to have found that Firkus had ever inspected the steps, or noticed or monitored the cracks.

should have been noted and which required replacement at that time. Nothing in any of this testimony supports a reasonable inference that the cracks worsened to a degree that could have mattered after the semiannual inspections that Telfer should have been conducting and before Firkus fell.

¶18 Similarly, Telfer points to no evidence supporting his suggestion that Firkus fell before Telfer could reasonably have taken corrective action, had he seen the cracks. Indeed, Telfer argues it is precisely because there was no evidence as to what Telfer calls "timing," by which we understand Telfer to mean how long it should reasonably have taken Telfer to address the cracks once he discovered them, that "the jury could have concluded that Firkus's fall could have occurred before the repair or warning could be accomplished." To the contrary, in the absence of any evidence as to "timing," and in the presence of unrefuted testimony that the cracks in the steps constituted a potential hazard in 2005 and should have been addressed then, it would have been unreasonable for the jury to have based its finding as to cause on an inference that Firkus fell before Telfer could reasonably have taken corrective action.

¶19 Telfer cites to ***Fondell***, 85 Wis. 2d 220, but ***Fondell*** does not support his position. In ***Fondell***, the supreme court stated, "the question of causation is usually one of fact for the jury, unless the evidence indicates that reasonable men could not differ as to a party's conduct being a substantial factor to the accident." ***Id.*** at 230. In that case, the supreme court reinstated a verdict finding both the plaintiff and defendant negligent in a slip-and-fall case without finding either party causally negligent. ***Id.*** at 223, 232. The court concluded that the evidence in that case as to causation was conflicting and inconclusive as to the conditions in the area of the plaintiff's fall. ***Id.*** at 231. Here, in contrast, there was no conflicting or inconclusive evidence as to causation. There was no dispute as

to the existence or condition of the cracks, as to the cracks being a potential hazard that required attention as long ago as 2005, and as to the absence of any other potential intervening factor in the sequence of events between Telfer's negligent failure to inspect and maintain the steps, and Firkus's fall through the steps. *See* ***id.*** at 227 ("an unbroken sequence of events must be proven" to demonstrate that "a party's negligence is a substantial factor in bringing about the harm and thus is the legal cause of the accident").

¶20 In sum, Telfer ignores the evidence that makes his suggested inferences unreasonable: the testimony that Telfer never inspected the property or looked at the steps, the testimony that the steps had not visibly changed since 2005 when Firkus moved in, and the testimony that the steps were a potential hazard in 2005 which needed to be fixed at that time. There is no credible evidence that supports the jury's finding that Telfer's failure to inspect and maintain was not a cause of Firkus's injuries.

¶21 Finally, regardless of the evidence, Telfer argues that the circuit court erroneously "conflated the negligence and cause analyses," when the court stated, "[Telfer] never inspected and he never maintained, so it was bound to happen at some point in time anyway." The record supports the circuit court's concise statement. The court identified Telfer's negligence as found by the jury—that Telfer did not inspect and maintain the rental property—based on the evidence that Telfer never inspected and maintained the property or the steps. The court then identified the absence of any evidence of other causes of the collapse of the steps. Finally, the court concluded that therefore, based on the evidence presented at trial, the only reasonable inference was that Telfer's failure to maintain the steps was a cause of Firkus's injuries as a matter of law. *See* ***Fondell***, 85 Wis. 2d at 229 (although "cause does not automatically follow a finding of negligence, that does

not prevent a [circuit] court, or this court, from finding cause to exist as a matter of law"). The circuit court did not assume causation from the jury's finding of negligence.

CONCLUSION

¶22 As explained above, we conclude that the circuit court properly found cause to exist as a matter of law and changed the jury's verdict as to cause accordingly. We therefore affirm the judgment.

By the Court.—Judgment affirmed.

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