COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-1502

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

GORDON KRUEGER,

PLAINTIFF-APPELLANT,

SENTRY INSURANCE, A MUTUAL COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

OLIN CORPORATION,

DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT,

V.

AUGUST WINTER & SONS, INC.,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Gordon Krueger appeals from a judgment dismissing his complaint and denying his motions after verdict. The issues on appeal are: (1) whether the circuit court erred by allowing expert evidence of OSHA enforcement policy; (2) whether the circuit court erred when it declined to find respondent Olin Corporation negligent as a matter of law; and (3) whether Krueger is entitled to a new trial in the interest of justice. We resolve these issues against Krueger and affirm.

BACKGROUND

Olin Corporation operated the Badger Ordinance Works near Baraboo. In the early 1990s, Olin contracted with August Winter & Sons, Inc., for the renovation of a building on the site. August Winter then subcontracted some of the work to Joe Daniels Construction. As part of its work, Joe Daniels cut holes in the floor of the building and then covered the holes with concrete forms to allow workers to walk over them.

In June 1991, while employed by August Winter, Krueger was injured in the building being renovated. He brought a personal injury action against Joe Daniels alleging that he had fallen into one of holes that he claimed was only partially covered by a concrete form. After settling with Joe Daniels, Krueger brought this action against Olin.

A jury trial was held. The jury returned a verdict finding the appellant forty percent causally negligent, Joe Daniels forty percent causally negligent, August Winter fifteen percent causally negligent, and Olin five percent causally negligent. After the trial, Krueger moved for a new trial. The circuit

court denied the motion and entered judgment dismissing Krueger's complaint, and it awarded Olin costs.

ANALYSIS

The first issue on appeal is whether the trial court properly allowed Olin's expert to testify about selective OSHA enforcement. Olin asserts that Krueger has mischaracterized the testimony of its expert and that the testimony complained of was not about selective enforcement of OSHA regulations. Instead, Olin asserts that its expert offered only his opinion that Olin was not in violation of a specific regulation and was not negligent.

The testimony about which Krueger complains is the following:

> Q: If you had been inspecting this hallway just before the accident as an OSHA compliance officer, would you have cited Olin?
>
> A: No.
>
> Q: Even if you had been inspecting this hallway after Mr. Krueger's accident and had learned of the accident, would you have cited Olin?
>
> A: No.

Olin first asserts that Krueger did not preserve this issue for appeal because he did not object to the testimony at trial. Krueger responds that he preserved it by objecting to this type of testimony at a pretrial motion in limine. Because we conclude that the circuit court properly exercised its discretion when it allowed the testimony, we will not reach the issue of whether Krueger waived the objection.

A trial court's decision to admit or exclude expert testimony is a discretionary determination that is made pursuant to § 901.04(1), STATS. The

decision will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Blair***, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991) (quoting ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983)).

Olin asserts that the testimony its expert offered was not about the selective enforcement of an OSHA regulation, as was not allowed in ***Uebele v. Oehmsen Plastic Greenhouse Mfg., Inc.***, 125 Wis.2d 431, 436-37, 373 N.W.2d 456, 459 (Ct. App. 1985). Olin states that its expert merely offered his opinion that Olin had not violated a specific regulation and that it was not negligent. This is a reasonable characterization of the expert's testimony. We conclude that the circuit court's decision to allow the testimony was itself reasonable.

The second issue is whether the circuit court erred when it declined to find Olin negligent as a matter of law. A verdict should be directed only when there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion. *See* ***Millonig v. Bakken***, 112 Wis.2d 445, 451, 334 N.W.2d 80, 83 (1983). In reviewing a decision not to direct a verdict, the appellate court must take the view of the evidence most favorable to the party against whom the verdict was sought. *See* ***id.***

Krueger asserts that the circuit court erred because the evidence was "undisputed" that the holes were unsafe and not properly covered.[1] Olin contradicts this assertion and cites to trial testimony, including its expert's

[1] In support of this assertion, Krueger gives two record cites. The first is to an affidavit from his attorney prepared after trial. This document, in turn, recites the same statement that is in Krueger's brief. This reference does not help the court determine whether this statement is accurate.

testimony that there was adequate cover over the holes and that Olin was not negligent. Viewing the evidence in the light most favorable to Olin, we conclude that the circuit court properly declined to direct a verdict against Olin. [2]

The third issue is whether Krueger is entitled to a new trial in the interest of justice. Krueger argues that he is entitled to a new trial because he was denied a meaningful inspection of the premises prior to trial. The circuit court denied Krueger's motion for a new trial. It appears that he is now asking this court to exercise our discretionary authority under § 752.35, STATS., to order a new trial in the interests of justice.[3]

In order to grant a new trial in the interest of justice, we must be convinced that there has been a miscarriage of justice or that the controversy has not been fully tried. *See* ***Andersen v. Village of Little Chute***, 201 Wis.2d 467, 480, 549 N.W.2d 737, 742 (Ct. App. 1996). Further, if we conclude that a miscarriage of justice occurred, we are required to find "a substantial probability of a different result on retrial." ***Id.*** (citation omitted).

Krueger asserts that he was denied a meaningful inspection because he and his experts were given access to the holes only two weeks before trial. Krueger further asserts that because of the limited time, his reconstructionist was not able to reconstruct the hole in which Krueger was injured until after trial. The question of which hole Krueger actually fell into was an issue during the trial.

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[2] We also agree with Olin's assertion that even if the circuit court's decision were error, it was harmless because the jury found Olin to be negligent.

[3] Krueger does not cite to the statute, but he does cite to a case which relies on the statute.

Krueger had also inspected the site, two years earlier, when the floor was covered with masonite. Krueger asserts that Olin may have deceived him about whether the masonite could have been removed during the first inspection. Krueger's expert testified at trial, however, that they did not ask to have the masonite removed during that first inspection and that he did not think having the masonite removed was important.

In responding to Krueger's arguments, Olin states that Krueger was allowed to inspect the property each time he asked to do so. Krueger inspected the property twice prior to trial. Further, Olin observes that Krueger had options available to him to address any concerns he had about the lack of meaningful inspection. He could have informally pursued the matter with Olin's attorneys; he could have made a request for inspection under § 804.09, STATS.; or he could have moved to compel discovery under § 804.12, STATS. He chose not to exercise any of these options. Krueger admits that, at least two months before trial, he was aware that the holes could be inspected.

Krueger had options available to him before trial to pursue an inspection which could have been more helpful. He chose not to pursue those options at the appropriate time. It appears from the record that the decision not to pursue a more "meaningful" inspection was Krueger's. Based on this record, Krueger has not convinced us that there has been either a miscarriage of justice or that the controversy has not been fully tried.

By the Court.—Judgment affirmed.

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