

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 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. 2014AP532

Cir. Ct. No. 2011CV75

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SHANE MAHNER,

PLAINTIFF-APPELLANT,

V.

VINCENT PARR, KIMBERLY ANDERSON AND DEBRA TUCKWAB,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Forest County:
LEON D. STENZ, Judge. *Reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Shane Mahner appeals a final order resolving postverdict motions and for judgment against Vincent Parr, Kimberly Anderson, and Debra Tuckwab in a civil battery action. Mahner argues the circuit court lost competency to act on the postverdict motions and erroneously apportioned liability

among the three intentional tortfeasors. Because no respondent has filed a brief refuting Mahner's arguments, we reverse in part and remand with directions to issue a corrected order/judgment.

BACKGROUND

¶2 Vincent Parr and his sister Kimberly Anderson physically attacked Mahner at a bar. Debra Tuckwab then joined in and also battered Mahner. Mahner suffered an orbital fracture, resulting in long-term headaches and vision problems. Parr, Anderson, and Tuckwab were all criminally prosecuted, and restitution was ordered.

¶3 Additionally, Mahner commenced a civil action for battery. Tuckwab defaulted, while the case proceeded to a jury trial against Parr and Anderson. The jury rendered its verdict on May 2, 2013. The jury found that Parr and Anderson each battered Mahner and caused him injuries. The jury awarded damages for past medical expenses, past pain and suffering, and future pain and suffering. Further, it attributed responsibility for the damages, assigning 65% to Parr, 15% to Anderson, and 20% to Tuckwab. Finally, the jury determined Parr and Anderson had engaged in concerted action together, but that Tuckwab did not engage in concerted action with anyone.

¶4 Mahner filed a postverdict motion arguing that it was improper to delineate responsibility among intentional tortfeasors and that each defendant should be held jointly and severally liable for the entire amount of damages. Parr and Anderson filed postverdict motions seeking a setoff for amounts of restitution paid in the criminal case. The trial court set a hearing for June 10, 2013.

¶5 As of the June 10, 2013 telephone hearing, neither Parr nor Anderson had provided evidence of the amount of restitution they had paid. Consequently, the court ordered that another hearing would be held. However, no hearing was scheduled until November 1, 2013. Mahner objected that, because over ninety days had elapsed, the postverdict motions were deemed denied pursuant to WIS. STAT. § 805.16.¹ The court adjourned the hearing to December 20, 2013.

¶6 At the December hearing, Mahner renewed his objection that the postverdict motions were already deemed denied. The trial court overruled the objection, observing, “Apparently it had gotten lost on the judicial assistant’s desk and didn’t get it [sic] done. No one asked or brought it to my attention that it needed to be held within that time period.” During the hearing, the court surmised that restitution offsets did not have to be requested via a postverdict motion, but Anderson’s attorney conceded that was what occurred.

¶7 Following the hearing, the court issued an order awarding the requested restitution offsets to both Parr and Anderson. It also denied Mahner’s motion requesting all three defendants be held jointly and severally liable for the entire damages award. Instead, the court adjudged Parr and Anderson jointly and severally liable for 80% of the damages, with Tuckwab individually liable for the remaining 20% of damages. Mahner appeals.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

DISCUSSION

¶8 Mahner argues the circuit court lost competency to act on the motions after verdict because they were deemed denied after ninety days elapsed, pursuant to WIS. STAT. § 805.16 and case law interpreting it. That statute provides:

If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record or the judge ... does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.

WIS. STAT. § 805.16(3). Mahner further argues the court erred because damages for intentional conduct are not subject to apportionment between multiple tortfeasors. He primarily relies on the following statement attributed to the RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §12: “Each person who commits a tort that requires intent is jointly and severally liable for the indivisible injury legally caused by the tortious conduct.” He also relies on *Rhinehart v. Whitehead*, 64 Wis. 42, 24 N.W. 401 (1885), for the proposition that an aider and abettor to a battery is jointly and severally liable in the same manner as if he or she had participated in the battery.

¶9 No response brief was filed by Parr, Anderson, or Tuckwab, despite notices of delinquency providing a five-day extension and a warning that failure to respond could result in penalties, including summary reversal under WIS. STAT. RULE 809.83(2). Mahner’s brief presents developed arguments that require a response. We therefore conclude Parr, Anderson, and Tuckwab concede the arguments presented in Mahner’s brief. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶10 Accordingly, we direct the trial court to modify the order/judgment to reflect that Parr, Anderson, and Tuckwab are each jointly and severally liable for 100% of Mahner's damages. Further, the court shall remove the offsets it granted for restitution paid, which were requested via postverdict motions that the trial court lost competency to decide.²

By the Court.—Order reversed in part and cause remanded with directions.

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

² We make no judgment as to whether the trial court may issue credits for restitution by means other than the motions after verdict in which the credits were sought.

