COURT OF APPEALS
DECISION
DATED AND FILED

October 25, 2016

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. 2015AP611 **Cir. Ct. No. 2011CV11498**

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

MARGARET GAGLIANO AND CHARLES GAGLIANO,

PLAINTIFFS-APPELLANTS,

BLUE CROSS FEDERAL, D/B/A ANTHEM BLUE CROSS AND BLUE SHIELD,

SUBROGEE/PLAINTIFF,

V.

AURORA HEALTH CARE METRO,

DEFENDANT-RESPONDENT,

NEMSCHOFF CHAIRS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Kessler, Brennan and Brash, JJ.

¶1 BRENNAN, J. Margaret and Charles Gagliano and their insurer ("the Gaglianos") appeal from a judgment entered on a jury verdict dismissing all claims against defendant Aurora Health Care Metro, Inc. and its insurer ("Aurora"). The Gaglianos seek discretionary reversal[1] pursuant to WIS. STAT. § 752.35 (2013-14).[2] For the reasons that follow, we conclude that they have not established that they are entitled to discretionary reversal. We affirm.

BACKGROUND

¶2 Margaret Gagliano asserted in her complaint that she was a patient at an Aurora hospital when a closed recliner footrest came open and struck her in the leg as she got up from the recliner. The Gaglianos alleged that the incident caused a severe and possibly permanent injury. They sued Aurora and other defendants claiming negligence and safe place statute violations. The case proceeded to a two-day jury trial. All defendants but Aurora were dismissed from the case by stipulation of the parties, and Aurora preserved its right to have the dismissed parties listed on the verdict. The jury returned a special verdict on October 30, 2014, finding Aurora negligent but finding that the negligence was not a cause of Gagliano's injury.[3] The jury also found that Gagliano was not negligent.

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[1] On appeal the Gaglianos do not dispute the trial court's determination that their motions after verdict were not timely filed. They therefore have no right of direct appeal and are limited to arguing for discretionary reversal. *See* ***Hartford Ins. Co. v. Wales***, 138 Wis. 2d 508, 511, 406 N.W.2d 426 (1987).

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] The special verdict read as follows:

Question No. 1:

(continued)

Was Aurora Health Care Metro, Inc. negligent in failing to maintain the premises as safe as the nature of its business would reasonably permit?

Answer: No

[Question 2 was to be answered only if the answer to Question 1 was "yes."]

Regardless of how you answered Questions 1 & 2, answer this question:

Question 3: Prior to the incident complained of by plaintiffs, was Aurora Health Care Metro, Inc. negligent?

Answer: Yes

Question 4:

If you answered "yes" to Question 3, answer this question:

Was such negligence a cause of injuries sustained by Margaret Gagliano?

Answer: No

Question 5: Prior to the incident complained of by plaintiffs, was Nemschoff Chairs, Inc. negligent?

Answer: Yes

Question 6: If you answered "yes" to Question 5, then answer this question:

Was the negligence of Nemschof Chairs, Inc. a cause of injuries sustained by Margaret Gagliano?

Answer: No

Question 7: Prior to the incident complained of by plaintiffs, was BSI negligent?

Answer: No

[Question 8 was to be answered only if Question 7 was answered "yes."]

Question 9: Prior to the incident complained of by plaintiffs, was the plaintiff, Margaret Gagliano, negligent?

(continued)

¶3 Before announcing the verdict, the trial court noted that there were dissenting jurors and addressed the question of whether the five-sixths rule was satisfied and the verdict was valid. *See* WIS. STAT. § 805.09(2) ("If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."); *see also* ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 401, 331 N.W.2d 585 (1983). The trial court determined that the verdict was valid and called for the jury to be brought in.

¶4 At that point, the Gaglianos' counsel, who was appearing by phone, asked to be excused from the remainder of the proceeding. The trial court responded, "Yes, as long as you're comfortable with your designee that's here being the individual that receives the verdict, I'll bring the jurors in and then announce the verdict in his presence." Counsel agreed. An employee of counsel's

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> Answer: No
>
> [Questions 10 and 11 were to be answered only if prior questions were answered "yes."]
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> Question 12: You are to answer this question regardless of how you have answered any of the previous questions:
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> What sum of money, if any, will fairly and reasonably compensate the plaintiff, Margaret Gagliano, for:
>
> a. Past medical expenses: $239,729.50
>
> b. Past pain, suffering, disability & disfigurement: $120,000.00
>
> Question 13: You are to answer this question regardless of how you have answered any of the previous questions:
>
> What sum of money, if any, will fairly and reasonably compensate the plaintiff Charles Gagliano for:
>
> a. Loss of society and companionship: $60,000.00.

firm, a technician gathering up equipment used in the trial, was present. The trial court announced the verdict and polled the jurors. After the jurors were dismissed, the trial court made the following statements:

> I do not know if motions after verdict are going to be pursued in this case, but what I do is in--one of the reasons I'm frustrated is that [Gagliano's counsel] isn't here to select a date when we can hear the motions after verdict should they be filed.
>
> So my clerk is going to announce a date. I know that--I think by law *they have to be filed within 20 days of receipt of the verdict*.…
>
> …. So we'll assume that those motions, if there be any, *are filed within 20 days.*
>
> They have to be heard within 60 days, so I'll set a date about 45 days out.

(Emphasis added.)

The trial court set December 16, 2014, as the date for hearing motions and stated, "[A]s I said, that it's up to the attorneys to timely file those motions[.]"

¶5 The Gaglianos filed their post-verdict motion after the 20-day period had passed. The trial court determined that it lacked competency to hear the untimely motion, and it entered judgment, from which the Gaglianos timely appealed, conceding their untimely filing and basing the appeal solely on grounds of discretionary reversal.

DISCUSSION

1. The Gaglianos are not entitled to discretionary reversal.

¶6 "Motions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions,

briefs or other documents." WIS. STAT. § 805.16(1). A party that does not timely file post-verdict motions in the trial court is not entitled to an appeal of those issues as of right. ***Hartford Ins. Co. v. Wales***, 138 Wis. 2d 508, 511, 406 N.W.2d 426 (1987). In such a case, "the appeals court has jurisdiction over a timely appeal and may in its discretion conclude that, in the interest of justice, the issues not assertable as a matter of right may nevertheless be reviewed." ***Id.*** The statute authorizing such discretionary reversal states:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or *that it is probable that justice has for any reason miscarried*, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial ….

WIS. STAT. § 752.35 (emphasis added).

¶7 This power to reverse "should be exercised sparingly and with great caution." ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. It is appropriate "only in the most exceptional cases." ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469.

¶8 In ***State v. Wyss***, our supreme court stated, "The grounds for ordering a new trial under the second part of sec. 752.35, Stats., when it is probable that justice has miscarried, have not changed since they first appeared in sec. 2405m, Stats. 1913 …." ***State v. Wyss***, 124 Wis. 2d 681, 736, 370 N.W.2d 745 (1985) *abrogated by* ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), on other grounds. Although "no bright line rule was articulated for determining when justice had miscarried in an individual case," cases decided under that language of the statute between 1913 and 1966 implicitly adopted a rule

"that the probability of a different result had to be established before a new trial would be ordered." ***Id.*** Then ***Lock v. State***, 31 Wis. 2d 110, 142 N.W.2d 183 (1966), "unequivocally established" this rule, and thereafter, our supreme court denied reversals in the interest of justice "on numerous occasions because it could not conclude that a new trial would produce a different result." ***Wyss***, 124 Wis. 2d at 736. "In cases where the court has considered whether to reverse due to a miscarriage of justice, it has examined the evidence in a light most favorable to the jury's verdict." ***Thompson v. Howe***, 77 Wis. 2d 441, 453, 253 N.W.2d 59 (1977). "In so viewing the record, the rule is that the jury's verdict must be sustained if there is any credible evidence which, under a reasonable view, supports the verdict." ***Id.*** The proper order in a discretionary reversal case where the appellate court does not grant reversal is to affirm the judgment. ***Hartford Ins. Co.***, 138 Wis. 2d at 514.

¶9 The Gaglianos argue that this court should grant discretionary reversal in this case because it is probable that justice miscarried. They argue that the defendants' negligence was causal as a matter of law, and therefore the jury's answer to the contrary is a miscarriage of justice and must be changed. They argue that "[a]bsent any other potential intervening factor in the sequence of events between Aurora's negligent failure to inspect and maintain the recliner in question and Margaret being struck by the malfunctioning recliner, Aurora's negligence must be a substantial factor in bringing about Margaret's harm and Aurora's negligence the legal cause of the accident." They therefore argue that this court must change the answer to Question 4 of the special verdict from "No" to "Yes."

¶10 First, it is well established that "negligence and causation are separate inquiries and that a finding of cause will not automatically flow from a

finding of negligence." ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 226, 270 N.W.2d 205 (1978) (footnote omitted). Further, "there is nothing inconsistent or irregular in the form of a verdict wherein the parties are found negligent, but such negligence is not causal of the injuries." ***Id.*** at 228. It is therefore simply not true that, as the Gaglianos assert, Aurora's negligence is causal as a matter of law just because Margaret Gagliano was found not to be negligent.

¶11 In determining whether there has been a miscarriage of justice, we view the evidence in the light most favorable to the verdict and sustain it if "any credible evidence" supports it. *See* ***Thompson***, 77 Wis. 2d at 453. The following facts were admitted into evidence. The recliner manufacturer had a warning in its service manual stating, "Do not exit the chair unless the footrest is completely retracted. If not retracted completely, the footrest may extend unexpectedly. Contact with a moving or extended footrest may cause loss of balance and fall resulting in death or serious injury." This was true even for a new recliner with no mechanical defect. The manufacturer did not affix the warning to the chairs in use at Aurora, and Aurora did not provide this warning to patients and visitors. However, Margaret Gagliano testified that before getting up from the recliner, she had "pushed [her] legs against it hard." She did not recall hearing the recliner footrest close. She was asked, "[A]nd did you do that because you knew that if you didn't close it all the way, it could pop up and hit you?" She answered "Yes." Thus, even without a warning from the manufacturer or Aurora, her testimony was that she knew what could happen if the footrest was not closed all the way.

¶12 Viewing this evidence in the light most favorable to the verdict, it is reasonable to conclude that Aurora was negligent. It was also reasonable for the jury to conclude that Aurora's negligence was not a legal cause of the accident, which may have been an improperly closed footrest, or an accident. Because

credible evidence exists to support this answer, the power of discretionary reversal should not be exercised in this case. The Gaglianos have pointed to nothing in the record that shows the probability of a different result on retrial. In fact, they specifically stated they did not seek a new trial, just the damages from the jury's verdict. Because we hold that the Gaglianos are not entitled to discretionary reversal, we need not address their additional arguments regarding changing the special verdict answer as a spoliation sanction, an issue that they did not preserve for appeal.[4]

¶13 We therefore affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[4] We note that the Gaglianos asked for a spoliation sanction on appeal. They do not claim that the trial court erred with regard to the spoliation issue, which related to the defendants' failure to preserve and make available to the plaintiffs the recliner that injured Gagliano. At a pretrial hearing, the Gaglianos withdrew a motion to strike Aurora's answer based on alleged spoliation and chose instead to seek a jury instruction. *See* WIS JI—CIVIL 400, Spoliation: Inference. The trial court gave the spoliation instruction they requested over defense objection. The jury rejected the opportunity to find the defendants negligent based on the claimed spoliation. Having opted for the jury instruction instead of seeking dismissal of Aurora's answer on grounds of spoliation, and then having failed to file a timely post-verdict motion, the Gaglianos have failed to present any "miscarriage of justice" argument for spoliation sanction.