COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2010

David R. Schanker
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. 2009AP259 **Cir. Ct. No. 2007CV1090**

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

JOSEPH ANTHONY,

PLAINTIFF-APPELLANT,

MIDWEST SECURITY ADMINISTRATORS, INC.,

PLAINTIFF,

V.

ERIE INSURANCE EXCHANGE, JOHN BUCKMASTER AND DEBBIE BUCKMASTER,

DEFENDANTS-RESPONDENTS,

PIERCE LEWIS, D/B/A A TO Z BEST CONSTRUCTION,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joseph Anthony appeals a judgment, following a jury trial, dismissing his negligence claims against John and Debbie Buckmaster and Pierce Lewis. Anthony argues he is entitled to a new trial because the circuit court made several evidentiary errors and improperly restricted his closing argument. He also contends the court erred by granting summary judgment in favor of the Buckmasters on one of his claims and by denying his request for default judgment against Lewis. We affirm.

BACKGROUND

¶2 Anthony rented a duplex from John and Debbie Buckmaster. In May 2005, while walking down the basement stairs, Anthony slipped and fell. As he fell, he grabbed the staircase handrail. One of the brackets securing the handrail to the wall gave way and Anthony was unable to prevent his fall. Anthony sued the Buckmasters and Lewis, a repairman who sometimes performed work on the Buckmasters' rental properties. The basis for Anthony's claims stemmed from repairs Lewis made to the handrail before Anthony moved in. In 2005, the handrail broke while a previous tenant was moving out and Lewis repaired it. Anthony alleged the Buckmasters negligently maintained and repaired the property and Lewis negligently repaired the handrail. Anthony also alleged the Buckmasters' negligence violated Wisconsin's safe place statute.

¶3 The Buckmasters moved for summary judgment on Anthony's safe place claim, arguing that the duplex was not covered by the safe place statute. The circuit court granted the motion.

¶4 The Buckmasters then moved, in limine, for an order barring Anthony from introducing evidence relating to defects in the design or construction of the handrail or stairs. They contended they were entitled to such an order because the builders' statute of repose, WIS. STAT. § 893.89,[1] precludes bringing an action against an owner or occupier of real estate based on design defects to real estate improvements more than ten years after the improvements were made. The circuit court granted the motion.

¶5 Following a four-day jury trial, the jury found the Buckmasters were not negligent in their maintenance or repair of the handrail or stairs. The jury was not asked to determine whether Lewis was negligent.

¶6 Anthony then brought a number of motions after the verdict. As relevant here, he challenged several of the circuit court's evidentiary decisions, including its decision to bar evidence of the handrail's original design and construction. He also argued he should have been permitted to comment, during closing argument, on the absence of testimony by Debbie Buckmaster, and that he was entitled to default judgment against Lewis. The circuit court denied Anthony's post-trial motions. He now appeals.

DISCUSSION

¶7 Anthony alleges he is entitled to a new trial because the circuit court erred in numerous respects. We have distilled four issues from his litany of alleged error. Thus, this appeal requires us to determine whether the court erred in: (1) admitting and excluding evidence; (2) restricting Anthony's closing

[1] References to the Wisconsin Statutes are to the 2007-08 version.

statement; (3) denying his request for a default judgment; and (4) granting summary judgment on his safe place claim.

1. Evidentiary decisions

¶8 Anthony challenges three of the circuit court's evidentiary decisions. He argues the court erred by: (a) barring evidence of defects in the original design and construction of the handrail and stairs; (b) admitting expert testimony that the Buckmasters were not negligent; and (c) excluding John Buckmaster's statement to his insurer. We review a circuit court's decisions to admit or exclude evidence for the erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

a. Evidence of the handrail's original design and construction

¶9 Anthony argues that when the circuit court granted the Buckmasters' motion to exclude evidence relating to defects in the design or construction of the handrail or stairs, it "applied an improper standard of law ... [that precluded] evidence concerning the unsafe conditions on the property ... essential to Mr. Anthony's case ...." We disagree.

¶10 First, although Anthony characterizes the court's ruling on this matter an error of law, we agree with the Buckmasters that the court's ruling was essentially evidentiary. As stated above, whether to admit or exclude evidence lies within the circuit court's discretion. We will uphold a circuit court's discretionary decision as long as the court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, arrived at a conclusion that a reasonable judge could reach. ***Id.***

¶11 Here, the circuit court held Anthony could not introduce evidence that the original design and construction of the handrail or stairs was defective to show the Buckmasters or Lewis negligently maintained or repaired them. Under the builders' statute of repose, Anthony could not have brought a claim based on original design or construction defects. *See* WIS. STAT. § 893.89. Therefore, it was reasonable for the court to conclude Anthony could not use evidence of defects to demonstrate the Buckmasters' or Lewis's present negligence.

¶12 Further, the record belies Anthony's protestations that the circuit court's ruling prevented him from introducing evidence essential to his case. Anthony contends the order prevented him from introducing evidence the handrail did not comply with housing codes and the Buckmasters breached their duty to maintain safe premises. However, he provides no citations to the record indicating he ever attempted to introduce evidence the duplex did not comply with housing codes. Nor does he allege what part of the code the Buckmasters ostensibly violated or indicate what evidence of the Buckmasters' negligent maintenance he was prevented from introducing.

¶13 To the contrary, the record indicates Anthony was permitted to submit ample evidence of the handrail's and stairs' alleged deficiencies and the Buckmasters' maintenance of the property. He introduced, among other things, his expert witness's opinion "the railing system as it existed at the time of the fall ... was inadequate." He also elicited testimony from Lewis about the repair he made to the railing and from John Buckmaster about his maintenance and inspection of the premises.

b. Expert testimony

¶14 Anthony argues the circuit court erroneously permitted the Buckmasters' expert, Tim Grocholski, to testify he believed the Buckmasters were not negligent. There are several problems with this argument.

¶15 First, WIS. STAT. § 907.04 provides that an expert witness's "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Second, Anthony's description of what occurred appears to be incorrect. He contends the circuit court "permitted Grocholski to render opinions on the question of the Buckmasters' negligence ...." But the portion of the record Anthony cites contains no reference to the Buckmasters' negligence. Instead Grocholski was asked whether "that work, that replacement, that repair [by Lewis] was done negligently." Third, before Grocholski provided the testimony to which Anthony now objects, Anthony himself called Grocholski directly and elicited his opinion about Lewis's repair. Even if there were anything objectionable about Grocholski's testimony, Anthony opened the door to Grocholski's opinion of Lewis's work.

c. Insurance statement

¶16 At trial, Anthony's counsel asked John Buckmaster if he gave a statement to his insurance company. When Buckmaster replied that he had, Anthony's counsel requested a copy of the statement. Anthony's counsel told the court he requested the statement during discovery, but the attorney who was then representing the Buckmasters withheld the statement as work product. The Buckmasters' trial counsel told the court he neither had the statement nor knew it

had been requested. The circuit court denied Anthony's request to compel the Buckmasters to produce the statement.

¶17 On appeal, Anthony again argues he was entitled to the statement. The Buckmasters counter that Anthony provides no record citation indicating he in fact requested discovery of the statement or that it was withheld as work product. They contend that because their counsel had no knowledge of this statement or of Anthony's alleged request for it, the circuit court properly concluded the Buckmasters were not obligated to produce it. Anthony does not refute this argument in his reply brief and therefore concedes it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

2. Closing argument

¶18 Debbie Buckmaster did not testify at the trial. During closing argument, Anthony's counsel pointed this out to the jury, saying "They didn't even have Mrs. Buckmaster testify. Why? Because she knew less than Mr. Buckmaster did." The Buckmasters' counsel objected and the court sustained the objection. Anthony continued, this time without objection, "Well, you [the jury] decide why they didn't have her testify."

¶19 Citing the "missing witness" jury instruction, Anthony contends he was "permitted to present in support of his case the fact that the opposing party's case suffers from a 'missing witness problem.'" We disagree.

¶20 First, Anthony in fact did ask the jury to "decide why they didn't have her testify." Second, the missing witness jury instruction does not authorize an attorney to carte blanche comment on the absence of testimony. While

"[a]ttorneys are entitled to reasonable latitude in [closing] argument and when commenting on the evidence," whether the argument is reasonable is committed to the discretion of the circuit court. ***Gainer v. Koewler***, 200 Wis. 2d 113, 126, 546 N.W.2d 474 (Ct. App. 1996). It was well within the circuit court's discretion to prohibit Anthony from speculating to the jury about why Debbie Buckmaster did not testify. ***Roeske v. Diefenbach***, 75 Wis. 2d 253, 262, 249 N.W.2d 555 (1977). Finally, Anthony's argument rings hollow because he does not explain why, if Debbie Buckmaster's testimony was essential, he did not call her himself.

3. Default judgment

¶21 Anthony argues the court should have granted a default judgment against repairman Lewis because "[i]t is undisputed that Mr. Lewis never joined issue after he was joined as a party in this case." A circuit court's decision whether to grant default judgment, however, is discretionary. *See* WIS. STAT. § 806.02(1); ***Oostburg State Bank v. United S & L, Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986).

¶22 We conclude the circuit court did not erroneously exercise its discretion when it denied Anthony's request for a default judgment. First, the court pointed out that Anthony never demanded Lewis be included on the jury verdict. Next, it observed that the jury's findings indicated it perceived the accident to be "one of those happenstances of life where a person just falls down, and, you know, no one was negligent." Therefore, it concluded "I can't find once the jurors decided that the Buckmasters weren't at fault and Mr. Anthony wasn't at fault, that Mr. Lewis would be at fault. I mean, there is nothing in the interest of justice that now requires me to go enter some judgment against Pierce Lewis because [he] apparently put the new wooden handrail back on." In determining a

default judgment was not appropriate, the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, arrived at a conclusion that a reasonable judge could reach. *See* ***Oostburg***, 130 Wis. 2d at 11.

3. Safe place statute

¶23 Finally, Anthony argues the circuit court erred when it granted summary judgment in favor of the Buckmasters on his safe place claim. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶24 Wisconsin's safe place statute, WIS. STAT. § 101.11, "is a negligence statute that imposes a heightened duty on employers and owners of places of employment and public buildings to construct, repair, or maintain buildings safely." ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶19, 291 Wis. 2d 132, 715 N.W.2d 598. The statute only applies to owners of places of employment and public buildings. A place of employment "includes every place ... where either temporarily or permanently any ... business is carried on ... and where any person is, directly or indirectly employed by another for direct or indirect gain or profit ...." WIS. STAT. § 101.01(11). Anthony contends the duplex was a place of employment because Lewis was employed there.[2] We disagree.

[2] Anthony also argues he was employed on the premises because he replaced the thermostat once of his own initiative and the Buckmasters allowed him to deduct the expense from his rent. We do not address this argument because we discern no serious argument this could ever constitute employment.

¶25 The only case Anthony cites to support his argument the duplex could be a place of employment because Lewis performed some work there is ***Wittka v. Hartnell***, 46 Wis. 2d 374, 175 N.W.2d 248 (1970). The facts there, however, were vastly different than here. There, the owner of a fourteen-unit complex employed one of the residents as a custodian caretaker in exchange for a partial rent credit. The court concluded this arrangement constituted "a contract of hire ... [which] contemplated regular employment at the agreed upon rate of compensation for an indefinite period of time." ***Id.*** at 383. However, here, Lewis had no set duties or compensation scheme with the Buckmasters. He simply made repairs in their rental units from time to time when they required his services. This is not analogous to the circumstances in ***Wittka***. To conclude otherwise would effectively convert nearly every rental property into a place of employment. The court, therefore, did not err when it granted the Buckmasters' motion for summary judgment on Anthony's safe place claim.

By the Court.—Judgment affirmed.

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