COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2009AP3076

Cir. Ct. Nos. 2001CV1866, 2004CV912

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

ARTHUR D. DYER, RUSSELL MOELLER, VERN MOELLER, ANTHONY VITRANO, BETTY VITRANO, THOMAS VITRANO AND RENEE VITRANO, A/K/A RENEE LIPITT,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

WASTE MANAGEMENT OF WISCONSIN, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

MUSKEGO SITE GROUNDWATER REMEDIATION GROUP,

DEFENDANT-CROSS-RESPONDENT.

MUSKEGO MOOSE FAMILY CENTER NO. 1057, BONNIE L. ACKER, D/B/A R&B STAGECOACH, KRIS MAGESKE, JULIA MAGESKE AND WENDY REINBOLDT, A/K/A WENDY DIEWALD,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

WASTE MANAGEMENT OF WISCONSIN, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

MUSKEGO SITE GROUNDWATER REMEDIATION GROUP,

DEFENDANT-CROSS-RESPONDENT.

APPEALS and CROSS-APPEALS from a judgment and orders of the circuit court for Waukesha County: KATHRYN W. FOSTER and PAUL F. REILLY, Judges.[1] *Affirmed in part; reversed in part and cause remanded with directions.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 LUNDSTEN, J. This appeal involves lengthy proceedings regarding a lawsuit brought by owners or occupants of land (collectively, the landowners) near a landfill in Waukesha County that was formerly operated by Waste Management. The landowners alleged that Waste Management acted negligently in allowing vinyl chloride, a hazardous substance, to travel from the landfill to the groundwater beneath the landowners' properties. After a jury verdict in favor of Waste Management, the landowners asked the circuit court to change the answer to the causation verdict question and to direct verdicts on the private nuisance and trespass claims. The circuit court granted the landowners' requests. As we explain, the circuit court's decisions were erroneous because they

[1] The orders and judgment on appeal were entered by Judge Kathryn W. Foster, with the exception of a September 2006 order entered by Judge Paul F. Reilly.

were based on an incorrect analysis of the interaction between particular acts or omissions alleged to be negligent and the issue of causation.

¶2 The cross-appeal, brought by the landowners, relates to issues raised in the landowners' motions for a new trial, which the circuit court denied. Among their contentions, the landowners argue that the circuit court improperly dismissed their claims related to a fear of developing cancer. We address each error alleged by the landowners, and conclude that reversal and remand for a new trial is not warranted.

¶3 Thus, we reverse the circuit court's decisions changing the verdict answer on the causation question and directing verdicts on the private nuisance and trespass claims and, accordingly, remand for entry of judgment in favor of Waste Management. We affirm the circuit court with respect to the issues raised in the cross-appeal.

Background

¶4 Over a number of years, Waste Management of Wisconsin, Inc., and its predecessor operated a landfill in Waukesha County. In 2001, after the landfill had long been closed, various owners and occupants of land near the landfill sued Waste Management. In 2004, additional landowners and occupants filed suit. The landowners' lawsuits, which were consolidated, also named other defendants that are not involved in this appeal.

¶5 The landowners' claims against Waste Management relate to the presence of vinyl chloride in the groundwater beneath the landowners' properties. Vinyl chloride is linked to an increased risk of developing certain types of cancer. The landowners alleged that Waste Management was responsible for the presence

of the vinyl chloride in their groundwater, and they sought compensation under a variety of legal theories. Three claims were eventually tried to a jury: negligent damage to property, private nuisance, and trespass. Based on these theories, the landowners sought property-related damages for diminution of property value; for annoyance, inconvenience, and loss of use and enjoyment of the property; and for restoration costs, among other damages.

¶6 Prior to trial, Waste Management conceded that "the source of the vinyl chloride detected in the groundwater beneath the [landowners'] properties is the [landfill]." Accordingly, at a trial lasting approximately seven weeks, the focus was on whether numerous alleged acts and omissions by Waste Management over the course of decades, individually or in combination, negligently caused vinyl chloride to enter the landowners' groundwater.

¶7 The jury returned a verdict that ultimately favored Waste Management. As to the negligence claim, the verdict form separately asked whether Waste Management was negligent and whether Waste Management's negligence was causal. Without specifying any particular act or omission, the jury found that Waste Management was negligent. But the jury then found that Waste Management's negligence was not a cause of the vinyl chloride in the landowners' groundwater. The jury also found that the landowners failed to prove their private nuisance and trespass claims.

¶8 Post-verdict, the landowners moved to change the answer to the causation question from "No" to "Yes." They also moved for directed verdicts in their favor on the trespass and nuisance claims. The circuit court granted the motions, which had the effect of setting aside the jury's verdict favoring Waste Management. Accordingly, the court entered judgment in favor of the

landowners. Waste Management appeals, arguing that the granting of these post-verdict motions was error.

¶9 The circuit court denied the landowners' separate motions for a new trial based on various errors. The landowners cross-appeal based on the issues raised in those motions.

Discussion

I. Waste Management's Appeal

¶10 Waste Management argues that, in persuading the circuit court to set aside a jury answer and to direct two verdicts, the landowners presented an unworkable legal framework and that the circuit court erred in adopting that framework as the basis for its decision. We agree with Waste Management, and explain our reasoning below.

A. Motion To Change The Causation Answer

¶11 Waste Management challenges the circuit court's decision to change the answer to a verdict question. WISCONSIN STAT. § 805.14(5)(c)[2] addresses this topic, and provides: "Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer."

¶12 Whether a verdict answer should be changed is a question of law, subject to *de novo* review. ***Reuben v. Koppen***, 2010 WI App 63, ¶19, 324 Wis. 2d 758, 784 N.W.2d 703. Courts may not upset a verdict answer if any credible

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

evidence supports the answer. *See* WIS. STAT. § 805.14(1); ***Langreck v. Wisconsin Lawyers Mut. Ins. Co.***, 226 Wis. 2d 520, 523-24, 594 N.W.2d 818 (Ct. App. 1999). In ***Reuben***, we further explained:

> [W]e view the evidence in the light most favorable to the jury's verdict, and we will sustain the jury's verdict if there is any credible evidence "under any reasonable view, that leads to an inference supporting the jury's finding." We search the record for credible evidence to uphold a jury verdict, not for evidence to support a verdict that the jury could have reached but did not. A court must uphold a jury verdict "even though [the evidence] be contradicted and the contradictory evidence be stronger and more convincing." This standard applies to the circuit court as well as the appellate court.

Reuben, 324 Wis. 2d 758, ¶19 (citations omitted).

¶13 In sum, a court may not change a jury's answer to a verdict question unless no credible evidence supports the answer. When a court does change an answer, the court is effectively holding, as a matter of law, that the evidence does not support the jury's answer and, instead, compels a different answer.

¶14 In the dispute before us, Waste Management contends that the circuit court erred when it changed the jury's causation answer from "No" to "Yes." The key to understanding this issue is understanding that, in this case, a finding that conduct was causal necessarily required a finding that a *particular* act or omission was causal. *See* ***Rockweit v. Senecal***, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995) (a cause of action for negligence requires "a causal connection between *the conduct* and the injury" (emphasis added)). That is, the landowners do not raise, and we do not address, negligence theories that might apply in special circumstances in which it might not be necessary to identify a particular negligent act or omission. *See, e.g.*, ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 598 n.2, 601-02, 492 N.W.2d 167 (Ct. App. 1992) (stating the requirements for a jury

instruction based on "res ipsa loquitur," which allows a jury to infer negligence under certain circumstances). Thus, it is not enough here that Waste Management was negligent in some respect and that the vinyl chloride migrated from its landfill to the landowners' property at some point in time.

¶15 It follows that, for the circuit court to meaningfully address the propriety of the jury's causation answer, the court needed to address whether particular alleged negligent acts or omissions of Waste Management were causal. As we explain below, the landowners did not ask the court to engage in this sort of analysis, the circuit court did not do so, and the landowners do not fill that void on appeal.

¶16 The jury found that Waste Management was negligent. But the negligence verdict question did not ask the jury to identify any particular negligent acts or omissions. The jury was asked:

> Was [Waste Management] negligent with respect to management, operation or remediation of groundwater contamination at or near the area of the Muskego Landfill?

Because the jury answered this question "Yes," the jury was required to address causation. The causation question asked:

> Was [Waste Management's] negligence a cause of damages to the property of: [list of the landowners].

The jury answered "No" as to each landowner listed, thereby ultimately resolving the negligence claim against the landowners.

¶17 Post-verdict, the landowners moved the circuit court to change the answer to the causation question. The landowners argued that they had proved at least four "theories" of negligence, which they summarized as follows:

"(1) inadequate testing of private wells; (2) failure to perform adequate and timely investigation and remediation; (3) acceptance of liquid wastes in violation of licenses; and (4) failure to warn." In fact, each of these "theories" is really a category covering multiple alleged acts or omissions. It is true that within these categories the landowners pointed to some examples of specific acts and omissions, calling them "brief summar[ies] of the evidence at trial," but nowhere did the landowners attempt to demonstrate to the circuit court that particular acts or omissions were both negligent and causal as a matter of law.

¶18 Instead, the landowners seemed to believe that, because the jury found Waste Management negligent under one or more of these theories, because there was sufficient evidence to support a finding of negligence under each of these theories, and because Waste Management conceded that the landfill was the source of vinyl chloride in the groundwater beneath the landowners' properties, no further analysis was necessary to justify changing the answer to the causation question. At the motion hearing, the landowners summarized their view as follows:

> The defendants concede that the landfill is the source. If you take the finding of negligence by the jury, then as a matter of law that negligence has to be a cause of the contamination. To ... reach any other conclusion would be pure speculation.[3]

[3] On appeal, the landowners present the same analysis. They argue:

> The jury found [Waste Management] negligent "with respect to management, operation or remediation of groundwater contamination at or near the Muskego Landfill." This is not, as [Waste Management] asserts, a situation where "there is no way to determine whether the negligent act found by the jury can be linked to the harm." The jury specifically found [Waste Management] negligent with regard to groundwater

(continued)

¶19 The circuit court essentially adopted the landowners' analysis. The court reasoned that, "in light of" Waste Management's concession that its landfill was the source of the contamination, a "link" between whatever negligence the jury found and causation "has to be made" as a matter of law. This analysis is flawed for at least two reasons.

¶20 First, the circuit court's theory of causation misperceives the import of Waste Management's concession. Waste Management conceded only that the landfill was the source of the vinyl chloride in the groundwater beneath the landowners' properties. As Waste Management points out, it did not concede that any of its acts or omissions were negligent. To the contrary, Waste Management primarily built its defense around the proposition that, despite the landfill being the source of the contamination, Waste Management conformed its conduct to the applicable standard of care at all relevant times and, therefore, was not negligent.

¶21 Second, the court's analysis of the causation question did not properly take into account the absence of identified negligent conduct. As explained above, determining that causation existed in this case required finding a causal connection between the landowners' alleged injuries and *particular negligent conduct*. It does not appear that there was any attempt to analyze

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> contamination "at or near" the landfill. The only harm the landowners sued for was the admitted [vinyl chloride] contamination of their groundwater. [Waste Management's] concession that its landfill was the source of the [vinyl chloride], coupled with the fact that there was no credible evidence of anything other than [Waste Management's] negligence and delay causing the contamination established [Waste Management's] liability as a matter of law.

(Record citations omitted.)

causation in light of any particular acts or omissions. Rather, the court simply noted that, due to the general wording of the negligence question and the many allegedly negligent acts and omissions, it was impossible to determine which particular act or omission—or combination of acts or omissions—the jury found to be negligent. Having noted this uncertainty, the court was not asked to, and did not, resolve it.

¶22 We acknowledge that, even though the verdict question did not allow the jury to identify which act or omission or combination of acts or omissions it found to be negligent, it was still theoretically possible to properly conclude that there was causation as a matter of law. To do this, however, the circuit court first needed to identify an act or omission that was negligent as a matter of law and then analyze whether that particular negligent act or omission was causal as a matter of law. To repeat, it is not enough that Waste Management was negligent in some unidentified respect and that vinyl chloride from Waste Management's landfill ended up in the landowners' groundwater. It is also not enough that there was sufficient evidence to support a jury finding of negligence with respect to particular acts or omissions. Rather, in this case, an act or omission deemed to be causal as a matter of law must have also been negligent as a matter of law—that is, the evidence of that causal act or omission needed to be such that all of the credible evidence compelled a finding of negligence.

¶23 It may be that the landowners have chosen not to pursue the correct analysis because they realize there is conflicting credible evidence with respect to each alleged negligent act or omission. Notably, the circuit court commented that "[t]here was and is considerable testimony and evidence that I am certainly certain was also weighed by the jury to say that Waste Management *wasn't* negligent" (emphasis added). We understand the circuit court to be acknowledging that there

was credible evidence going both ways with regard to the various acts or omissions alleged to be negligent.[4] But regardless of the reason, the landowners have not made a viable argument on this topic.

¶24 Finally, we observe that the landowners' reliance on ***Wintersberger v. Pioneer Iron & Metal Co.***, 6 Wis. 2d 69, 94 N.W.2d 136 (1959), merely highlights what is missing here. ***Wintersberger*** involved a truck-trailer turning in front of and injuring a bicyclist. ***Id.*** at 71. The circuit court found that the operator of the truck, in making an improper right turn from a left lane, was negligent as a matter of law. ***Id.*** The jury found that this negligent act was not a cause of the injury sustained. ***Id.*** at 71-72. The court changed the causation

[4] We note that there were so many negligence possibilities that the landowners' counsel, during closing arguments, said he was not going to attempt to cover all of the possibilities. Instead, by our count, the landowners' counsel offered an apparent subset consisting of at least seven possibilities. These included allegations that Waste Management:

- accepted liquid waste in the 1970s;
- failed to timely test groundwater plumes for vinyl chloride in the 1980s;
- failed to remove barrels of liquid after contamination was found;
- failed to timely use "other methods" to prevent the spread of contamination;
- failed to take samples at various wells in the 1990s;
- failed to test the groundwater at the proper depth; and
- failed to timely warn landowners of contamination.

The landowners' counsel argued that, as to these alleged acts and omissions, the jury should "look at ... the standard [of care] at [a particular] time and see whether the standard was actually followed at that time," which meant applying evidence about standards of care over the course of decades.

verdict answer from "No" to "Yes," and the supreme court affirmed. ***Id.*** at 72-74, 77. It was possible in ***Wintersberger*** to analyze whether the causation answer should be changed because the court began with a particular act that was negligent as a matter of law and was able to determine whether that particular negligent act was, as a matter of law, a substantial factor in causing the bicyclist to crash and be injured. *See* ***id.*** at 73-74. We have no such as-a-matter-of-law negligent act here.

B. Directed Verdicts On Private Nuisance And Trespass

¶25 Waste Management contends that the circuit court erred when it directed verdicts on two other claims, private nuisance and trespass. We agree.

¶26 As with the negligence claim, the private nuisance and trespass claims are premised on Waste Management's negligent acts or omissions having caused vinyl chloride to enter the landowners' groundwater. For the private nuisance claim, the jury was instructed that "Plaintiffs must prove defendants were negligent in maintaining and/or failing to abate the nuisance" and that the "negligence caused the invasion of and/or interference with Plaintiffs' use or enjoyment of their properties." *See* ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶6, 277 Wis. 2d 635, 691 N.W.2d 658 ("[I]n order to establish a prima facie case for liability for a nuisance, there must be proof of the nuisance, proof of the underlying tortious conduct giving rise to the nuisance, and proof that the tortious conduct was the legal cause of the nuisance.").

¶27 For the trespass claim, the jury was instructed that, "[b]efore you may find the defendants trespassed [i.e., that Waste Management's vinyl chloride trespassed], you must find that the defendants' negligence was a cause of the trespass." *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 677, 476 N.W.2d 593 (Ct. App. 1991) ("Trespass may be either an intentional intrusion or

an unintentional intrusion resulting from reckless or negligent conduct or from an abnormally dangerous activity.").

¶28 In their post-verdict argument on this topic, the landowners relied on the same negligence argument that underpins their argument for a change in the answer to the negligence causation question. And, again, the circuit court employed the same reasoning—that unspecified negligent acts or omissions, as a matter of law, caused the vinyl chloride contamination.

¶29 On appeal, the landowners present nothing new. That is, they again contend that their argument directed at the negligence causation question "appl[ies] equally" to the private nuisance and trespass claims. In other words, the landowners' argument relies on the same framework that we have already rejected.[5]

¶30 Accordingly, we reverse the granting of directed verdicts on the private nuisance and trespass claims.

II. The Landowners' Cross-Appeal

¶31 In their cross-appeal, the landowners contend that the circuit court erroneously denied their post-trial motions seeking a new trial. We disagree.

[5] Neither party suggests that there is a distinction that matters here between the legal principles that apply to changing a verdict answer and to directing a verdict. Accordingly, we do not summarize the law applicable to directing a verdict.

A. Fear-Of-Cancer Claims

¶32 The landowners argue that the circuit court erred when, pretrial, it dismissed their claims for negligent infliction of emotional distress. The emotional distress claims were based on the allegation that vinyl chloride exposure led to a fear of developing cancer. The circuit court dismissed the fear-of-cancer claims based on public policy factors. On appeal, the landowners argue that the circuit court erred in the following respects: (1) the court failed to accord deference to a special master's decision on the topic; (2) the court improperly relied on ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 601 N.W.2d 627 (1999); and (3) the court failed to recognize that ***Babich v. Waukesha Memorial Hospital, Inc.***, 205 Wis. 2d 698, 556 N.W.2d 144 (Ct. App. 1996), has already resolved the public policy factors in favor of the landowners. We are not persuaded.

1. Deference To The Special Master's Decision

¶33 The landowners point out that the circuit court's decision to dismiss the fear-of-cancer claims was in the posture of a review of a special master's decision on the same topic. The landowners argue that the circuit court should have, but did not, give the special master's decision deference. We reject this argument for the following reasons.

¶34 First, the landowners do not demonstrate that the circuit court was obliged to give deference to the special master's decision. Instead, the landowners seemingly assume that deference was required because the circuit court's order appointing the special master stated that the special master's rulings could only be overturned based on an erroneous exercise of discretion. The circuit court,

however, effectively reconsidered this topic when the court concluded that the question was one of law and that it owed no deference to the special master. The landowners do not demonstrate that the court's reconsideration of its own order was impermissible or that the court's revised view was incorrect.

¶35 Second, even if the circuit court was bound by its own prior order, we reject the landowners' contention that we must reverse simply because the circuit court applied an incorrect standard when it "reversed" the special master. In support of this contention, the landowners cite ***Kenyon v. Kenyon***, 2004 WI 147, ¶¶36, 39-40, 277 Wis. 2d 47, 690 N.W.2d 251, for the proposition that, when a circuit court applies an incorrect standard of law, reversal is required. This is a misreading of ***Kenyon***. In the paragraphs from ***Kenyon*** that the landowners rely on, the supreme court simply explains that it is remanding to permit the circuit court to exercise its discretion under a correct legal standard. *See* ***id.*** The ***Kenyon*** court does not, as the landowners assert, broadly hold that reversal is always required when a circuit court applies an incorrect legal standard.

¶36 To the contrary, it is the well-established general rule that, "if a circuit court reaches the right result for the wrong reason, we will nevertheless affirm." *See* ***Milton v. Washburn County***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924. Thus, even if the circuit court erroneously failed to give deference to the special master's decision, the question remains whether the decision to dismiss the fear-of-cancer claims was correct. In other words, the landowners' "deference" argument fails because it provides no basis for concluding that the circuit court's decision is wrong.

2. The Circuit Court's Reliance On ***Sopha***

¶37 The landowners' complaint about the circuit court's reliance on ***Sopha*** is also unavailing. The landowners assert that the court incorrectly believed that ***Sopha***, a personal injury asbestos case, provided support for dismissal here. *See* ***Sopha***, 230 Wis. 2d 212, ¶6 (addressing whether "a person who brings an action based on a diagnosis of a non-malignant asbestos-related condition may bring a subsequent action upon a later diagnosis of a distinct malignant asbestos-related condition"). More specifically, the landowners contend that ***Sopha*** "does not hold that [claims for actual cancer] exist to the exclusion of [fear-of-cancer claims]." But, even if ***Sopha*** does not support the circuit court's decision, that does not mean that the circuit court's decision is wrong. And, as we have explained, we are concerned with whether the circuit court's ruling was correct, even if the circuit court's route to that decision was flawed.

3. ***Babich***

¶38 We turn our attention to the landowners' reliance on the public policy analysis in ***Babich***. The circuit court's dismissal of the landowners' fear-of-cancer claims was ultimately based on public policy considerations. The landowners contend that the circuit court erred because the public policy issues in this case were addressed and resolved in the landowners' favor by the ***Babich*** decision. We disagree.

¶39 In ***Babich***, the plaintiff, after being accidentally stuck with a hypodermic needle while at a hospital, sued for emotional injuries related to her fear of contracting HIV. ***Babich***, 205 Wis. 2d at 701-03. The plaintiff "did not have specific knowledge that this needle had been in contact with any HIV-positive patient or that the hospital was even treating a person who was

HIV-positive." ***Id.*** at 703. We rejected the needle-stick claim on public policy grounds, but noted that, given different facts, public policy would not bar such a claim. ***Id.*** at 706-09. Specifically, we concluded that, if a future needle-stick victim could offer what was lacking in that case, namely, "proof that the needle came from a contaminated source," public policy would not bar the claim. *See* ***id.*** at 706-07.

¶40 Here, the landowners argue that, because they were exposed to a "contaminated source," namely, the contaminated groundwater, ***Babich*** "already weighed [the pertinent] public policy implications" in the landowners' favor. The landowners contend that ***Babich*** "obviates any public policy concerns" in this case. Waste Management responds that this reliance on ***Babich*** is foreclosed by ***Dyer v. Blackhawk Leather LLC***, 2008 WI App 128, 313 Wis. 2d 803, 758 N.W.2d 167. We agree with Waste Management.

¶41 Our 2008 ***Dyer*** decision (***Dyer I***) involved many of the same underlying facts. There, landowners appealed the decision to dismiss defendants that were "businesses that, at various times, generated waste that was dumped at the landfill." *See* ***id.***, ¶1. We addressed the landowners' fear-of-cancer claims, premised on ***Babich***, and concluded that ***Babich*** did not dictate the result. We explained:

> The plaintiffs finally claim that as a result of their exposure to vinyl chloride, they are afraid that they will develop cancer and that they are entitled to compensation for this fear. They cite ***Babich v. Waukesha Memorial Hospital, Inc.***, 205 Wis. 2d 698, 556 N.W.2d 144 (Ct. App. 1996). In ***Babich***, a patient in a hospital was stuck by a hypodermic needle left in her bed. ***Id.*** at 701. The patient (along with her husband) sued the hospital, claiming emotional distress in the form of fear that she had been infected with HIV. ***Id.*** at 701-02. This court affirmed a grant of summary judgment against the plaintiffs. ***Id.*** at 702. We adopted a "contaminated source" rule limiting

> such claims: we held that the victim of a needlestick must provide evidence that the needle came from a "contaminated source" before he or she can sustain an emotional distress claim for fear of HIV. ***Id.*** at 706-07.
>
> The plaintiffs seize on the words "contaminated source" and seem to believe that ***Babich*** means that their "cancer-fear" claims are valid as a matter of law, because their groundwater constitutes a "contaminated source" of water. *We note that the analysis in* ***Babich****, by its own terms, is specific to needlesticks and HIV.* We reached the result in that case by considering the public policy factors for cutting off liability in negligence cases. *See* ***id.*** at 707-09. Simply identifying an object in any given case and labeling it a "contaminated source" ignores these public-policy factors. Further, as we have discussed above, the plaintiffs have produced no evidence that the [defendants] had anything to do with the vinyl chloride contamination in their wells. Having failed to show causation, the plaintiffs cannot receive damages, whether for physical harm to their property or for emotional distress.

Dyer, 313 Wis. 2d 803, ¶¶25-26 (emphasis added).

¶42 In this appeal, the landowners make substantially the same argument that we addressed and rejected in ***Dyer I***. That is, as in ***Dyer I***, the landowners here argue that ***Babich***'s contaminated-source analysis "obviates any public policy concerns" in this case. That argument was rejected in ***Dyer I*** with the explanation that the "contaminated source" analysis in ***Babich*** was "specific to needlesticks and HIV." *See* ***Dyer***, 313 Wis. 2d 803, ¶26. Thus, ***Dyer I*** resolves this issue against the landowners. The landowners do not otherwise develop a stand-alone public policy argument and, accordingly, we move on.[6]

[6] The landowners also argue that the circuit court's erroneous decision to dismiss the fear-of-cancer claims led the court to erroneously exclude damages evidence relating to the claims that were tried. We need not address the merits of this argument because we have concluded that the circuit court erroneously changed the answers to the liability questions. This means that Waste Management is not liable for damages, and the error, if any, in the exclusion of damages evidence was harmless.

B. The Homsy Memorandum And The Allocation Documents

¶43 The landowners next raise evidentiary arguments that we have already addressed and resolved against them in ***Dyer I***. More specifically, the landowners argue that a document referred to as the Homsy Memorandum was improperly determined to be privileged, and that certain "allocation" documents should have been, but were not, made available by Waste Management during discovery. In ***Dyer I***, we rejected both arguments. *See* ***Dyer***, 313 Wis. 2d 803, ¶¶7-17. The landowners contend that, on these topics, ***Dyer I*** was wrongly decided. We are, however, bound by our prior decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We therefore address the matter no further.

C. Evidence Related To Arthur Dyer's Separate Civil Action

¶44 The landowners argue that the circuit court committed reversible error when it allowed Waste Management to present evidence relating to a claim filed by one of the landowners over a failed business venture. The business venture involved Arthur Dyer and the purchase of a mall by a company in which he had a controlling interest. The landowners' specific complaint concerns a line of questions that elicited testimony that Dyer was a plaintiff in a lawsuit seeking $120 million in damages against the City of Muskego based on allegations that the city conspired to prevent the mall's development. The landowners argue that this evidence did not relate to the present case and that admission of this evidence was reversible error because it improperly "impugn[ed] Mr. Dyer's character." We conclude that the admission of this evidence, even if error, does not warrant reversal.

¶45 When the circuit court ruled on this topic pretrial, the court was under the impression that the mall-related evidence was relevant because it supported the view that there were other causes of some of Dyer's claimed property losses. In post-verdict proceedings, however, the court acknowledged that it had been wrong in admitting the evidence at trial because the mall venture ultimately was not connected to this case. The court went on to conclude that this error was harmless. We agree.

¶46 Error is harmless when there is no "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *See* ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698. "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Id.*** (citation omitted).

¶47 Assuming, for argument's sake, that the mall-venture evidence was erroneously admitted, we conclude that its admission was harmless. First, given the volume of the evidence presented, the landowners do not persuade us that the brief testimony about the conspiracy lawsuit would have stood out in the minds of the jurors. The landowners point only to one brief exchange in the lengthy trial transcript involving a reference to Dyer's lawsuit against the city.[7] This exchange

[7] The landowners point to the following exchange, during Arthur Dyer's testimony, after an attorney for Waste Management presented Dyer with an exhibit identified as a "Notice of Injury—Notice of Claim":

> Q. And I noticed where it says "Claimant," one of them is Arthur D. Dyer. And so you're a claimant against the City on this Notice of Claim, correct?
>
> A. Yes.
>
> Q. And if we go to page 8, the last paragraph, where it says, "Claimant[s] [h]old multiple claims," do you see that?

(continued)

was short, and there is no reason to suppose it stood out as significant. Second, the landowners do not adequately explain why, even if this exchange stood out, the jury would have necessarily formed a negative impression based on it, much less such a strong negative impression that it would have affected the jury's decision making in this case. Third, Dyer was only one of many plaintiffs in the lawsuit. There is no reasonable possibility that this Dyer-specific exchange affected the jury's view of the landowners' case as a whole.

D. Jury Instruction On Undefiled Water Supply

¶48 The landowners contend that the circuit court's decision not to give a requested jury instruction on their right to an undefiled water supply was reversible error. The landowners refer us to the following requested jury instruction: "Wisconsin law recognizes that access to, and use of, an undefiled underground water supply is a right of private occupancy." They argue that this instruction was necessary because, without it, the jury was "probably" misled into thinking that the jury instructions referred only to landowner "property," such as surface water and soil, and not groundwater. We are not persuaded.

¶49 "As a general matter, if we determine 'that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no grounds for reversal exist[].'" ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶50,

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A. Yes, sir, I do.

Q. Okay. And it says "Claimant seeks recovery against the city in the amount of $120 million," do you see that?

A. Yes, I do.

246 Wis. 2d 132, 629 N.W.2d 301 (citation omitted). Further, even where the circuit court commits an error, "there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *See* ***id.***, ¶52.

¶50 The circuit court here observed that the landowners' requested instruction was "a common sense statement" and was "implicit," given the subject matter of this case, in the other jury instructions. We agree. As Waste Management accurately explains, "the focus of the [landowners'] entire case was their claim that [Waste Management] damaged their right to enjoy their properties by contaminating the groundwater beneath their properties." It defies reason to think that the jurors failed to understand that this case was about groundwater contamination.

E. Cumulative Effect Of Errors

¶51 Finally, the landowners argue that, regardless whether we agree that any particular error warrants reversal, the errors that we have discussed, when considered for their cumulative effect, warrant reversal. The landowners couch this argument in terms of the discretionary power to reverse in the interest of justice when "it appears from the record that the real controversy has not been fully tried." *See* WIS. STAT. § 752.35. We decline to exercise our discretionary power to reverse. It is sufficient to say that we do not believe that reversal is warranted given the cumulative effect of the limited number of errors that we have identified or assumed.

Conclusion

¶52 For the reasons discussed, we reverse the circuit court's changing of the causation verdict question and its granting of directed verdicts on the private nuisance and trespass claims in favor of the landowners and, therefore, we remand to the circuit court for entry of judgment in favor of Waste Management consistent with this opinion. We affirm the circuit court with respect to the challenges raised in the landowners' cross-appeal.

By the Court.—Judgment and orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.