COURT OF APPEALS
DECISION
DATED AND RELEASED

June 7, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1795

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

JESSE A. KAPLAN, a minor, by his Guardian ad Litem THOMAS P. TOFTE,

Plaintiffs-Appellants,

v.

ARTHUR RADWILL, ALVERA RADWILL and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants-Third Party Plaintiffs-Respondents,

RACINE COUNTY,

Defendant,

v.

KATHERINE KAPLAN,

Third Party Defendant.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Jesse A. Kaplan appeals from a judgment dismissing his claim for injuries sustained when a glass door broke at an apartment building owned by Arthur and Alvera Radwill. He argues that the jury verdict was contrary to the evidence and that a new trial should be granted because of the improper admission of evidence. We affirm the judgment.

This is an action under the Wisconsin safe place statute, § 101.11(1), STATS. On July 9, 1988, Kaplan, then age five, was injured when the glass in the front door of the apartment building shattered as he pushed against the glass to open the door. The door contained plate glass. Kaplan contends that after 1976, when safety glass became the industry standard for doors, the Radwills had a duty under the safe place statute to replace the plate glass with safety glass. The jury determined that the Radwills had not failed to maintain the apartment building as safe as its nature would reasonably permit. Kaplan moved the trial court to change answers on the verdict or, in the alternative, for a new trial on several grounds under § 805.15(1), STATS. The trial court upheld the jury's determination.

Kaplan argues that a new trial should be awarded because the verdict is contrary to law or the weight of evidence. *See* § 805.15(1), STATS. The standard of review that we must apply to a claim that a new trial must be granted because the verdict was against the weight of the evidence requires us to sustain the verdict if there is any credible evidence which supports it. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983). Thus, the issue is more one of the sufficiency of the evidence rather than whether the trial court erroneously exercised its discretion in denying Kaplan's motion for a new trial.[1] *See* ***id.*** at 408-09, 331 N.W.2d at 593-94.

[1] Both parties suggest that we review for a misuse of discretion. Our standard of review here can be contrasted with that applied to a motion for a new trial in the interests of justice because the jury's findings are contrary to the great weight and clear preponderance of the evidence. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983). A new trial may be granted in the interest of justice when jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App.

A jury verdict will be sustained if there is any credible evidence to support the verdict. ***Radford v. J.J.B. Enters.***, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991).

This is even more true when the trial court gives its explicit approval to the verdict by considering and denying postverdict motions. The credibility of the witnesses and the weight afforded their individual testimony are left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury. It is this court's duty to search for credible evidence to sustain the jury's verdict, and we are not to search the record for evidence to sustain a verdict the jury could have reached but did not.

Id. (citations omitted).

The safe place statute requires an owner of a public building to repair and maintain such building "as to render the same safe." Section 101.11(1), STATS. To find that the owner failed to maintain the premises as safe as the nature of the place reasonably permitted, it must be determined that the owner had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for a sufficient length of time before the accident that the owner or its agents in the exercise of reasonable diligence should have discovered the defect in time to remedy the situation. WIS J I—CIVIL 1900.4; *see also* ***Boutin v. Cardinal Theatre Co.***, 267 Wis. 199, 203-04, 64 N.W.2d 848, 851 (1954).

(..continued)
1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995). Such a motion is within the discretion of the trial court and will not be reversed on appeal unless the trial court clearly exercised its discretion erroneously. ***Id.*** Our role in that instance is not to seek to sustain the jury's verdict but to look for reasons to sustain the trial court. ***Id.***

The evidence established that plate glass in a door is not as safe as safety glass. Kaplan argues that the Radwills had a duty to replace the glass in the door because the uncontroverted evidence established the Radwills' notice of the defect. Don Pogorzelski, owner of a glass repair shop, testified that in 1979 he replaced the glass in the rear door of the apartment building. At that time the law required him to replace the glass with safety glass.[2] He indicated that at that time he recommended to the "apartment manager" that the plate glass in the front door be replaced with safety glass. The "manager" responded to Pogorzelski that he would take up the recommendation with the owner. Pogorzelski also indicated that he saw Arthur Radwill every once in a while between the time of his 1979 visit to the building and Kaplan's accident. He testified that he told Radwill that safety glass is mandatory as replacement in any broken door and he recommended that the plate glass in any other doors be replaced with safety glass.

Arthur Radwill could not recall any 1979 conversation with his son, Scott Radwill, about Pogorzelski recommending that the front door be replaced with safety glass.[3] He also did not know if he was told by persons at the glass shop that plate glass should be replaced with safety glass. Radwill acknowledged that before Kaplan's accident he was aware of the advantages of safety glass and that if he had known that the front door was plate glass he would have had it replaced with safety glass. However, Radwill indicated that he did not know whether the front door was plate or safety glass.

---

[2] Pogorzelski testified that after 1976, safety glass became the industry standard and state and federal laws required the use of safety glass in new and replacement installations. *See* § 101.125(3), STATS. This testimony was not disputed.

[3] Kaplan's examination of Arthur Radwill presumes that Scott Radwill was the apartment manager in 1979. The evidence does not directly support that presumption. An invoice from the glass shop for the 1979 replacement job was issued to Scott and indicates that Scott was living at the apartment building at that time. Despite having the invoice before him, Pogorzelski testified that he did not know the name of the individual he regarded as the "apartment manager" and to whom he made his recommendation. When asked if the Radwills ever had an on-site manager for the building, Alvera Radwill indicated that she would not describe the person as a manager but more as an on-site maintenance worker and that such a role was first started in about 1988. Although asked if Scott was living in the building when the 1979 replacement was made, Alvera was never asked if Scott was the apartment manager.

Given the conflicting evidence as to the Radwills' notice of the potential hazardous condition, we cannot conclude that the jury verdict is contrary to the weight of the evidence. Kaplan characterizes Arthur's testimony as indicating that "he does not deny" that his son told him that it was recommended that the front door glass be replaced and that "he does not deny that he had conversations" with Pogorzelski about replacing the glass in the front door. Although that may be a fair interpretation of the testimony, an equally fair interpretation, and that drawn by the jury, is that such recommendations were either not made or not conveyed to Arthur. The evidence that Pogorzelski told Scott that the front door glass should be replaced is indefinite and insufficient to support a finding that the Radwills' agent or employee had knowledge which should be imputed to them.[4]

The issue of notice was a credibility matter involving the testimony of Pogorzelski and Arthur. The jury was free to reject Pogorzelski's recollection of the advice he gave concerning replacement of the door. *See* ***O'Connell v. Schrader,*** 145 Wis.2d 554, 557, 427 N.W.2d 152, 153 (Ct. App. 1988). Pogorzelski's testimony concerned conversations which occurred more than twelve years earlier and was based in part on the usual practice utilized by the glass shop. By placing an odd twist on Pogorzelski's recollective powers, the Radwills rendered Pogorzelski's credibility somewhat suspect by eliciting his testimony that he could recall in a general sense what happened on each and every installation, five or six a day, that he has done in the last twelve years. A person's ability to remember the details of events which happen routinely as contrasted with a rare and unusual occurrence is a matter for the jurors to weigh based on their own observation and experience of the affairs of life. The jury does not leave its common sense at the courthouse door. *See* ***De Keuster v. Green Bay & W. R.R. Co.***, 264 Wis. 476, 479, 59 N.W.2d 452, 454 (1953).

We defer to the jury's function of weighing and sifting conflicting testimony. *See* ***State v. Wilson***, 149 Wis.2d 878, 894, 440 N.W.2d 534, 540 (1989). Given Arthur's testimony that he was not aware that the front door glass was

[4] See footnote 3.

plate glass and that it was recommended that it be replaced, we conclude that the jury's no negligence verdict is supported by credible evidence.[5]

Kaplan contends that the admission of improper evidence entitles him to a new trial. A motion for a new trial on the ground of error at trial is addressed to the trial court's discretion. *See* ***Klein v. State Farm Mut. Auto. Ins. Co.,*** 19 Wis.2d 507, 510, 120 N.W.2d 885, 886 (1963). A ruling on such a motion will not be disturbed unless there was an erroneous exercise of discretion. ***Id.*** Although the issue of improper testimony was argued on Kaplan's motion after verdict, the trial court did not specifically address it. Thus, we review the record to determine whether a reasonable basis existed for denying Kaplan's motion for a new trial.

The allegedly offensive evidence is Pogorzelski's testimony on cross-examination that in 1977 when the law required safety glass in new installations, the law did not require property owners to replace undamaged glass with safety glass. Kaplan argues that the testimony created the impression that the Radwills had no legal duty to replace the plate glass door. He claims it is an erroneous statement of law given the safe place duty to maintain the property as safe as reasonably possible.

We first note that Kaplan's objection to the question posed to Pogorzelski was that it was immaterial evidence. The objection did not question whether Pogorzelski was qualified to testify about the requirements of the law. Pogorzelski was offered by Kaplan as an expert witness in the field of glass installation. Kaplan tapped on Pogorzelski's knowledge to elicit testimony that the industry standards had changed because people were being severely injured in plate glass accidents. Pogorzelski also testified that he has kept up with the laws regarding when safety glass needs to be installed. At Kaplan's request, the expert witness instruction was given to the jury. Since Pogorzelski was held out by Kaplan as an expert, we conclude that he was qualified to give testimony about the laws under which he operates.

---

[5] Through his mother's testimony, Kaplan suggested that the glass in the front door was loose. Kaplan's mother testified that she told the live-in cleaning person that the glass was a little shaky in its frame. The cleaning person testified that she cleaned the glass door every week and did not feel any movement in the glass. Kaplan does not argue this evidence on appeal.

On direct examination Pogorzelski testified that the state and federal laws required glass installers to utilize safety glass. Although § 101.125(3), STATS., was not specifically referenced, Kaplan opened the door to questions concerning laws requiring safety glass. Pogorzelski's testimony that owners were not required to replace unbroken glass was in fair response to that elicited on direct examination. Thus, the trial court properly exercised its discretion when it allowed Pogorzelski's response "in light of the questions that have been asked so far."

Further, the inquiry of whether property owners were required to replace unbroken glass with safety glass was tied to § 101.125(3), STATS. It followed Pogorzelski's acknowledgement that beginning in 1977 safety glass was required in new installations. Pogorzelski's testimony was not an erroneous statement of the law under § 101.125(3). It did not travel to the general duties of a property owner under the safe place statute.

Even if Pogorzelski's testimony clouded the safe place duties or was admitted in error, we conclude that the error was harmless. *See* § 805.18(2), STATS. The jury was instructed as to the owners' duties under the safe place statute. An additional instruction was given, as drafted by Kaplan, to minimize the significance of Pogorzelski's testimony. The instruction was as follows:

> There has been testimony concerning the law regarding the installation of safety glass. These laws relate only to the duties of sellers or installers of glass products, not to the duty of the owners of the premises. This testimony should not be considered in determining what the Radwills' duties were nor in determining whether Arthur and Alvera Radwill failed to perform their duties under the safe place statute. The court will instruct you on the Radwills' duties under the safe place statute.

We conclude that the instruction cured any potential prejudice from Pogorzelski's testimony. *See* ***Sommers v. Friedman,*** 172 Wis.2d 459, 467-68, 493 N.W.2d 393, 396 (Ct. App. 1992) (potential prejudice is presumptively erased when admonitory instructions are given). The instruction was specific to

Pogorzelski's testimony and reoriented the jury to consider only duties under the safe place statute. A new trial is not required and the trial court's denial of Kaplan's motion must be affirmed.

Finally, Kaplan requests us to exercise our independent discretionary power of reversal and order a new trial in the interest of justice. *See* § 752.35, STATS. Kaplan argues that the jury was misled by an erroneous statement of law and that the uncontroverted evidence established the Radwills' negligence. We have rejected these claims. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992).

Neither counsel for the appellant nor the respondents have included pinpoint cites for case citations in their briefs as required by RULE 809.19(1)(e), STATS., and the incorporation of A UNIFORM SYSTEM OF CITATION (15th ed. 1991). For this violation of the rules of appellate procedure, we penalize each attorney $25. *See* RULE 809.83(2), STATS. Within ten days of the date of this opinion, counsel for the appellant and for the respondents shall submit payment of the $25 penalty and shall not charge the penalty to any client.

By the Court.—Judgment affirmed.

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