COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1622 **Cir. Ct. No. 2009CV1586**

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

BARBARA J. ALLEN,

PLAINTIFF-APPELLANT,

V.

DAN LUCE, TUESDEE LUCE, TRUCK INSURANCE EXCHANGE, MARY BUECHNER AND ALLSTATE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Barbara Allen appeals pro se from an order granting judgment on the jury's verdict that her neighbors, Dan and Tuesdee Luce and Mary Buechner, were not negligent with respect to the private nuisance at

Allen's home caused by flooding. Allen argues that the trial court erred in its ruling on motions in limine, that the case was submitted to the jury on the wrong legal theory, and that the jury instructions were inaccurate and incomplete. We conclude that Allen's claim that denial of her motion in limine was error is too inadequately developed to permit review and that her remaining issues are not preserved for appeal. We affirm the order.

¶2 Buechner and the Luces own homes adjacent to Allen's on Moose Lake. Allen commenced this action alleging that Buechner and the Luces made changes in their grading, driveway locations, landscaping, and dwellings so as to redirect water onto her property, rendering her property uninhabitable at times due to flooding. She claimed her neighbors were negligent and had created a nuisance on her property.

¶3 Before the jury trial, the Luces moved to exclude testimony from lay or expert witnesses that improvements to the Luce property violated zoning ordinances, variances, floor area ratio, administrative regulations, or the Waukesha County shoreline requirements. Allen moved to exclude evidence that her property was insured and that she had made claims and received payments from her insurer. The trial court ruled that no lay witness could testify about zoning or regulation violations unless a proper foundation was laid and, with that caveat, it denied the Luces' motion to broadly exclude evidence of violations. The trial court denied Allen's motion to exclude evidence of insurance payments.

¶4 The jury trial was conducted over four days. The jury's verdict was that a private nuisance existed on Allen's property but that neither the Luces nor Buechner was negligent with respect to the private nuisance or in any other way. The jury determined that Allen was negligent with respect to the private nuisance

and otherwise and that her negligence caused her loss. The jury awarded zero damages.

¶5 Allen moved for a new trial in the interest of justice, alleging that in arguments to the jury, the defense made accusations not supported by the evidence. The trial court denied the motion and granted judgment on the jury's verdict. Allen, appearing pro se for the first time, filed a notice of appeal.[1]

¶6 We first address Allen's claim that the trial court wrongly decided her motion to exclude evidence of insurance payments. Her argument is undeveloped. The trial court applied the rule recognized in ***Lambert v. Wrensch***, 135 Wis. 2d 105, 121, 399 N.W.2d 369 (1987), that where subrogation is present, the collateral source rule[2] is inapplicable and evidence of insurance payments is properly admitted. Allen fails to address ***Lambert*** and explain why the trial court's reliance on it was misplaced. She merely asserts that the trial court applied an incorrect limitation to evidence under ***Fischer v. Steffen***, 2011 WI 34, 333 Wis. 2d 503, 797 N.W.2d 501, and makes no further explanation. The collateral source rules works in tandem with the rules of subrogation, and sometimes the made whole doctrine. ***Id.***, ¶33. Allen's appellate argument does not address the interplay of the rules and therefore, we do not consider her unexplained,

[1] Allen filed her notice of appeal on July 13, 2011. Prior to filing her notice of appeal, Allen filed a pro se motion for relief from the judgment under WIS. STAT. § 806.07, for a new trial due to plain errors, and for sanctions against offending parties. The motion was heard and decided after the notice of appeal was filed. "[A]n appeal from a judgment does not embrace an order entered after judgment." ***State v. Jacobus***, 167 Wis. 2d 230, 233, 481 N.W.2d 642 (Ct. App. 1992). Allen did not file a notice of appeal following entry of the August 11, 2011 order denying her motion. For these reasons, issues raised in that motion are not before this court.

[2] The collateral source rule provides that "a tortfeasor's liability to an injured person is not reduced because the injured person receives funds from other sources." ***Fischer v. Steffen***, 2011 WI 34, ¶30, 333 Wis. 2d 503, 797 N.W.2d 501.

underdeveloped, and unsupported argument that the trial court erred in allowing evidence of insurance payments.[3] *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Further, because the jury rendered a no liability verdict, evidence of insurance payments, if error, was harmless error because such evidence bears only on damages.

¶7 Within her argument about the denial of her motion to exclude evidence of insurance payments, Allen complains about admission of the evidence of sump pump failure concurrent with the flooding she experienced in 2008. Apparently she believes that evidence about insurance opened the door to admission of evidence about the sump pump failure. Allen does not show that any objection was made on this ground to admission of evidence about sump pump failure. We do not address an issue not preserved by an objection at trial. *See* ***State v. Edelburg***, 129 Wis. 2d 394, 400, 384 N.W.2d 724 (Ct. App. 1986) ("Failure to object to an error at trial generally precludes a defendant from raising the issue on appeal."). She also fails to explain any basis to exclude evidence of the sump pump failure.

¶8 Allen complains that the written order memorializing the trial court's rulings on the Luces' motion in limine did not accurately reflect the court's ruling and consequently, she was denied the right to present paramount evidence about zoning and regulation violations. This is an issue that Allen raised in her pro se

[3] For the first time in her reply brief, Allen asserts that because her insurer assigned its subrogation rights to her, ***Lambert v. Wrensch***, 135 Wis. 2d 105, 399 N.W.2d 369 (1987), does not apply. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm.***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). Moreover, even in the reply brief, Allen's argument is undeveloped because she fails to discuss the interplay of the collateral source and subrogation rules.

motion for a new trial ruled on after this appeal was taken and we do not address it. Additionally, Allen made no objection to the written order that was signed by the trial court on the first day of the jury trial, and so any objection is forfeited.[4] *See* ***id.*** In any event, we have compared the written order to the oral ruling and observe that the order encompasses the trial court's mandate that the Luces' motions were denied with the caveat that a proper foundation was to be laid for any lay witness discussing zoning or regulation violations.

¶9 Allen argues that the trial court committed error by submitting the case on nuisance and comparative negligence rather than deciding, as a matter of law, that proven violations of the zoning ordinances created a nuisance per se. She characterizes the case as involving intentional harm not permitting a comparison of negligence. Allen forfeited any complaint about the theory on which the case was submitted to the jury. At the hearing on the motions in limine, Allen disavowed any intent to pursue a declaration of a nuisance per se. The verdict was formulated on the claims stated in Allen's complaint. She points to no objection made to the form of the verdict or the jury instructions on the theories submitted for the jury's consideration. *See* WIS. STAT. § 805.13(3) (2011-12)[5] ("Failure to object at the conference constitutes a waiver of any error in the proposed

[4] Although older cases sometimes use the words "forfeiture" and "waiver" interchangeably, the two words embody very different legal concepts. When the right to make an objection or assert a right on appeal is lost because of failure to do so in the trial court, the proper term is "forfeiture." ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612.

[5] Allen's citation to WIS. STAT. § 805.13(4) as forgiving her failure to object is misplaced. Section 805.13(4) relieves a party of the obligation to object to a material variance between the written jury instructions and the way they are read to the jury. It has no application here.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

instructions or verdict."); ***Gosse v. Navistar Int'l Transp. Corp.***, 2000 WI App 8, ¶19, 232 Wis. 2d 163, 605 N.W.2d 896. Additionally, Allen did not raise claims about the jury instructions or verdict in her motion after verdict. For that additional reason, she forfeited her argument that the case was decided on the wrong theory. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987) (failure to include alleged error in the motion after verdict constitutes waiver of the error).

¶10 Allen complains about portions of the jury instructions, contends she was entitled to the "emergency doctrine" instruction, suggests the jury's verdict was inconsistent, and complains about evidence that a hydrologist reviewed the case that was admitted over her objection. She also suggests that punitive damages should be awarded. These issues are also forfeited by the failure to raise them by timely objections at trial and in the motion after verdict. *See* ***J.K. v. Peters***, 2011 WI App 149, ¶25, 337 Wis. 2d 504, 808 N.W.2d 141 (alleged evidentiary errors, even if objected to during trial, must be raised in motions after verdict or are forfeited); ***Ford Motor Co.***, 137 Wis. 2d at 417.

By the Court.—Order affirmed.

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