COURT OF APPEALS
DECISION
DATED AND RELEASED

June 5, 1997

NOTICE

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.

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

No. 95-3619

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

SUSAN I. OLSON, AND WILLIAM N. OLSON,

PLAINTIFFS-RESPONDENTS,

V.

STAPLETON CORPORATION, STAMPCO, INC., WOLOHAN LUMBER COMPANY, D/B/A WOLOHAN LUMBER & HOME IMPROVEMENT CENTER,

DEFENDANTS-APPELLANTS,

AETNA INSURANCE COMPANY OF AMERICA,

DEFENDANT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Stapleton Corporation, Stampco, Inc. and Wolohan Lumber Company, d/b/a Wolohan Lumber & Home Improvement Center appeal from a money judgment entered on a jury verdict. The jury found Stapleton/Stampco liable for injuries to respondent-plaintiff Susan Olson caused by a sharp metal edge on an attic stairway manufactured by them and sold by Wolohan. Before this court, appellants argue that the circuit court: (1) erred in permitting respondents to use depositions taken in a case within federal district court in Tennessee (***Marshall v. Stapleton***, 92-2214) to which Wolohan was not a party; (2) erred in permitting "expert testimony" from these depositions although respondents did not identify deponents as experts per a scheduling order requirement; (3) abused its discretion by failing to grant appellants' motion to adjourn; (4) erred in failing to grant appellants' motion to dismiss on the grounds that respondent failed to introduce the requisite expert testimony regarding negligent manufacture;[1] (5) abused its discretion in denying appellants' motion to show the jury respondent Susan Olson's injured hand; and (6) erred in permitting an accountant named by respondents to testify as an expert in the field of home crafts. For the reasons set forth below, we reject these arguments and affirm.

BACKGROUND

Susan Olson cut her hand and injured a tendon while ascending a folding stairway manufactured by Stampco/Stapleton, and sold by Wolohan. At trial, she testified that the injury caused pain and suffering and also caused her to lose wages from her regular job, as well as profits from a home craft business. Evidence regarding Stampco/Stapleton's manufacturing practices was introduced

[1] We presume argument two (error to permit expert testimony from depositions) and argument four (error to dismiss for lack of expert witnesses) are intended in the alternative.

at trial in the form of depositions taken in ***Marshall v. Stapleton***, a 1992 federal case from Tennessee. Evidence regarding lost profits was introduced through the testimony of respondents' expert Robert Link, a certified public accountant (C.P.A.). The jury found appellants liable on theories of negligent manufacture; failure to warn; and defective product, unreasonably dangerous.[2] Olson was awarded $4,000 pain and suffering, $592.82 lost wages and $23,000 past and future lost profits from the craft business.

ANALYSIS

Use of ***Marshall*** Depositions

Appellants argue that the circuit court erred in permitting the use at trial of depositions taken in ***Marshall***, a suit against Stampco and Stapleton in the federal district court in Tennessee. Appellants first argue that there was no showing that the witnesses were unavailable, and hence the depositions were prohibited hearsay under §§ 908.04 and 908.045,[3] STATS. We reject this

[2] As discussed further below, the form of the verdict was generalized, with the jury instructed to find comparative negligence and damages if it found liability under any of these theories.

[3] The relevant portions of those statutes read:

> 908.04 … (1) "Unavailability as a witness" includes situations in which the declarant …
>
> > (e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.
>
> 908.05 … The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the

(continued)

argument. Before the circuit court, appellants' counsel was asked about the availability of the deponent-witnesses and replied "I believe they're unavailable." The circuit court then found that "[t]he parties admit these witnesses are out of state; they're not subject to subpoena within Wisconsin." Having invited the error (if error it is) appellants' counsel is estopped from complaining to this court that the error occurred. ***Soo Line R.R. Co. v. Office of the Comm'r of Transp.***, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992).[4]

Appellants next argue that because Wolohan was not a party to ***Marshall***, it was improper to permit deposition testimony from ***Marshall*** into evidence against them. We disagree. Where previously deposed witnesses are unavailable, and where there is an identity of issues, an identity of parties is not necessary. ***Feldstein v. Harrington***, 4 Wis.2d 380, 385, 90 N.W.2d 566, 569 (1958). Appellants do not deny that the issues are the same in this case as in ***Marshall***; rather appellants focus on Wolohan's absence. But Wolohan's absence from ***Marshall*** is not fatal under ***Feldstein***. This is especially true in this case, where the circuit court found the manufacturer to be responsible to Wolohan for 100% indemnification for any liability of Wolohan's, because Wolohan's liability was derivative.

---

instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

(2)

[4] Appellants argue that counsel's statement cannot be taken as a stipulation. However, once the circuit court relied on counsel's statement to make a factual finding of unavailability, and counsel failed to object, counsel has waived the right to object before this court. ***Soo Line***, 170 Wis.2d at 557, 489 N.W.2d at 678. *See also* § 901.03(1)(a), STATS. ("[e]rror may not be predicated upon a ruling which admits … evidence unless … a timely objection … appears of record ….").

Expert Witnesses Not Identified

Per Scheduling Order

Appellants argue that permitting ***Marshall*** deposition testimony from Dennis Russell, Steve Weldon and Edward Weisenfels violated a scheduling order requiring respondents to name expert witnesses by a certain date—a date before the date on which respondents revealed their intention to use ***Marshall*** deposition testimony. In making this argument, however, appellants concede that neither Russell nor Weldon were ever qualified as expert witnesses in ***Marshall.*** Further, other than mentioning Weisenfels' name, appellants make no argument regarding his testimony. Respondents argue that Russell, Weldon and Weisenfels were lay witnesses, properly disclosed at the same pretrial conference where appellants revealed their lay witnesses. Respondents also argue, correctly, that this argument was not raised before the circuit court.[5] We will not consider matters raised for the first time before this court. ***Zeller v. Northrup King Co.***, 125 Wis.2d 31, 35, 370 N.W.2d 809. 812 (Ct. App. 1985).

Motion to Adjourn

Appellants argue that the circuit court erred in failing to adjourn the trial to permit them to procure copies of the ***Marshall*** depositions. Respondents argue that appellants were aware of ***Marshall*** from discovery requests, and that it is not respondents' responsibility to assure that appellants had a complete copy of all the ***Marshall*** proceedings. Respondents also point out that appellants were in a

[5] Appellants argue that their generalized objections to the deposition testimony should be sufficient to preserve all objections to the deposition testimony. We disagree. We require particularized objections to be made to the circuit court in order to permit that court to correct errors before the return of the verdict. Among other policies, this requirement helps avoid the necessity for appeal. ***Ollinger v. Grall***, 80 Wis.2d 213, 223, 258 N.W.2d 693, 699 (1977).

better position than respondents to obtain copies, since appellants Stampco and Stapleton were parties to ***Marshall***, the persons deposed were either Stampco or Stapleton employees, and that appellants' counsel made no request of respondents[6] for deposition copies in the interim eight days between the pretrial conference and trial. The record supports respondents' contention. Appellants' counsel indicated that he received the ***Marshall*** file from the firm representing the ***Marshall*** defendants Stampco and Stapleton, but that the file lacked depositions.

Discovery matters are within the discretion of the circuit court. ***Earl v. Gulf & Western Mfg. Co.***, 123 Wis.2d 200, 204, 366 N.W.2d 160, 163 (Ct. App. 1985). We will sustain a discretionary decision if the circuit court engaged in a rational mental process of considering together the facts and the law to achieve a reasoned and reasonable interpretation. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). The court here concluded that defendants-appellants were not surprised by the proposed use of the deposition transcripts, and that defendants could have found out more through interrogatories,

---

[6] The transcript on this point reads:

> THE COURT: [addressing defendants-appellants counsel Mr. Brennan] … You made no effort to get [the deposition transcripts] … from [plaintiffs-appellants' counsel] Mr. Lyons?
>
> MR. BRENNAN: And he made no effort to send them to me.
>
> THE COURT: You made no effort to get them from Mr. Lyons; is that correct?
>
> MR. BRENNAN: I didn't know until Tuesday—
>
> THE COURT: Sir, I asked you a direct question. I want a direct answer.
>
> MR. BRENNAN: No, sir. I did not.

had they desired to do so. Having made such findings and basing its holding upon them, the court did not err in denying the motion to adjourn.

Dismissal Motion

Appellants argue that the circuit court erred in failing to grant their motion to dismiss at the close of respondents-plaintiffs' case. Appellants argue that respondents failed to introduce expert testimony[7] that the stairway was negligently manufactured or was defective or was unreasonably dangerous. Respondents argue that no case law requires expert testimony on these points. We need not resolve this controversy. The jury verdict found liability on several grounds, including "the failure to adequately warn of the condition of the metal edges of the stairway." Other portions of the verdict form submitted to the jury directed the jury to answer comparative liability questions and set damages if liability had been found on failure to warn or other theories. Insofar as we can determine, no objection was raised to the form of the verdict. No party has argued to this court that failure to warn requires expert testimony. No party objected to the generalized nature of the jury verdict. The jury found liability under several theories. Thus, even if appellants are correct concerning the need for expert testimony under one theory of liability, the remaining theories form a more than sufficient ground to sustain the verdict. We search the record for credible evidence to support the jury verdict. ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984) (*overruled on other grounds by*

[7] As noted, previously, appellants take an inconsistent position as to whether Russell, Weldon and Weisenfels were experts. If they were, as appellants argue for scheduling order purposes, there was no absence of expert testimony as appellants argue here.

DeChantu Monarch Life Ins. Co., 200 Wis.2d 559, 576-77, 547 N.W.2d 592, 598-99 (1996).

Injured Hand

Appellants argue that the circuit court abused its discretion in failing to permit them to show plaintiff-respondent Susan Olson's hand to the jury. Admissibility of evidence is submitted to the sound discretion of the circuit court, and its rulings will not be overturned unless the court abused its discretion. ***Vonch v. American Standard Ins., Co.***, 151 Wis.2d 138, 150, 442 N.W.2d 598, 602 (Ct. App. 1989). Like the circuit court, we fail to understand why the outward appearance of Olson's hand was relevant to this loss of function case where no permanent injury was claimed. Therefore, we cannot conclude that the circuit court misused its discretion in this matter.

Expert Testimony

Appellants argue that the circuit court erred in permitting respondents-plaintiffs' expert, Robert Link, to testify about lost profits. Appellants contend that Link had no basis for making profit projections in the craft industry. Qualification of an expert witness is a matter for the discretion of the circuit court. ***State v. Morgan***, 195 Wis.2d 388, 536 N.W.2d 425 (Ct. App. 1995). We will sustain the court's determination if it is a reasoned and reasonable application of the law to the facts. ***Hartung***, 102 Wis.2d at 66, 306 N.W.2d at 20-21. If a person has qualifications in a field, he may testify within his area of competency, ***Roberts v. State***, 41 Wis.2d 537, 551, 164 N.W.2d 525, 531 (1969), provided that such testimony assists the trier of fact to understand evidence or determine a fact in issue. ***State v. Richardson***, 189 Wis.2d 418, 423, 525 N.W.2d 378, 380 (Ct. App. 1994). Under this standard, the circuit court did not misuse its

discretion in concluding that Link, a C.P.A., had the credentials to assist the jury in understanding Olson's claimed past and future profits. Once qualified, witness credibility and the weight afforded their individual testimony is left to the province of the jury. ***Fehring***, 118 Wis.2d at 305-06, 347 N.W.2d at 598. That the jury here fulfilled its obligation to determine weight and credibility is demonstrated by the fact that they awarded as lost profits a sum less than half of that Link projected. Therefore, we reject appellants' claim that Link's testimony was incorrectly admitted.

By the Court.—Judgment affirmed.

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