COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
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. 2013AP1900 **Cir. Ct. No. 2008CV442**

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

JACOB BREKKEN, A MINOR, BY AND THROUGH HIS PARENT AND GUARDIAN, CHRISTOPHER BREKKEN AND CHRISTOPHER BREKKEN, INDIVIDUALLY,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

ANN KNOPF,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

WAYNE (JOHN) KNOPF,

DEFENDANT,

V.

CHERYL LYNN BREKKEN,

THIRD-PARTY DEFENDANT,

SECURA SUPREME INSURANCE COMPANY,

INTERVENING DEFENDANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Pierce County: JOSEPH D. BOLES, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Jacob Brekken and his father, Christopher Brekken, appeal an order that granted Ann Knopf's motion for judgment on a jury's verdict and denied the Brekkens' postverdict motion for a new trial. The jury found in Knopf's favor on the Brekkens' claims for battery—offensive bodily contact and intentional infliction of emotional distress. The Brekkens argue: (1) the circuit court should have answered certain questions on the special verdict as a matter of law; (2) the court erroneously instructed the jury regarding an element of the battery claim; (3) no credible evidence supports the jury's verdict on the battery claim; and (4) no credible evidence supports the jury's verdict on the intentional infliction of emotional distress claim. We conclude the Brekkens have forfeited their right to appellate review of each of these issues. Accordingly, we affirm the order granting judgment on the verdict and denying the Brekkens' postverdict motion.

¶2 Knopf cross-appeals, arguing the circuit court erred by denying her motion to dismiss for failure to prosecute, pursuant to WIS. STAT. § 805.03, and her motion to dismiss the battery claim at the close of evidence, pursuant to WIS. STAT. § 805.14(4).[1] Because we affirm the order granting Knopf judgment on the verdict, her cross-appeal is moot, and we need not address it.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

BACKGROUND

¶3 Jacob met Knopf during the first half of 2006, when she was a substitute teacher in his sixth-grade English class. He began dating Knopf's daughter in the late summer of 2006. After that relationship ended in December 2006, Jacob and Knopf began communicating with each other via instant messenger and e-mail. Sometime around April 2007, their communications took on a romantic tone. Jacob and Knopf ultimately engaged in sexual relations, including intercourse and oral sex, on two occasions in May 2007. At that time, Jacob was thirteen years old, and Knopf was thirty-eight.

¶4 Knopf was criminally charged in connection with her relationship with Jacob. She pled guilty to one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2), on July 16, 2008.

¶5 The Brekkens filed the instant lawsuit against Knopf on October 16, 2008.[2] The Brekkens' complaint asserted various claims, including battery—offensive bodily contact and intentional infliction of emotional distress. The case proceeded to trial in January 2013, and the jury found in Knopf's favor on each of the Brekkens' claims. Knopf subsequently moved for judgment on the verdict, and the Brekkens moved for a new trial, pursuant to WIS. STAT. § 805.15(1). The circuit court denied the Brekkens' motion for a new trial and entered an order granting Knopf judgment on the verdict.

[2] Knopf's husband was also named as a defendant. The Brekkens' claims against him were dismissed with prejudice on November 23, 2011. In addition, Knopf filed a counterclaim against Christopher and a third-party claim against Jacob's mother, Cheryl Brekken. The circuit court dismissed those claims on summary judgment, and we affirmed the court's decision. *See* ***Brekken v. Knopf***, Nos. 2009AP2637, 2009AP2976, unpublished slip op. (WI App Sept. 14, 2010).

DISCUSSION

¶6 On appeal, the Brekkens raise multiple claims of circuit court error. However, their appellate arguments are sometimes difficult to discern. Their arguments tend to overlap, and the precise legal basis for their requested relief is not always clear. Having identified the Brekkens' arguments as best we are able, we conclude, for the reasons explained below, that the Brekkens have forfeited their right to appellate review of each issue they raise.

I. Circuit court's failure to answer verdict questions as a matter of law

¶7 The Brekkens argue the circuit court should have answered Questions 1 and 2 on the special verdict as a matter of law. Questions 1 and 2 pertained to the Brekkens' claim for battery—offensive bodily contact. Question 1 asked, "Did Ann Knopf intentionally cause offensive contact with Jacob Brekken?" If the jury answered Question 1 in the affirmative, it was instructed to answer Question 2, which asked, "Did Jacob Brekken consent to the contact?" The jury answered Question 1 "No," finding Knopf did not intentionally cause offensive contact with Jacob. As a result, the jury did not answer Question 2.

¶8 The Brekkens assert the circuit court should have answered Question 1 on the special verdict "Yes" and Question 2 "No" as a matter of law. However, the Brekkens have forfeited their right to appellate review of this issue. WISCONSIN STAT. § 805.13(3) requires a circuit court to conduct a jury instruction and verdict conference at the close of evidence. During the conference, "[c]ounsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record." ***Id.*** "Failure to object at the conference constitutes a waiver of any

error in the proposed instructions or verdict." ***Id.***[3] The purpose of this rule is to give the opposing party and the circuit court an opportunity to correct the error and to facilitate appellate review of the grounds for the objection. ***Air Wis., Inc. v. North Cent. Airlines, Inc.***, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980). "[I]n the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review." ***Id.***

¶9 The Brekkens did not object to the inclusion of Questions 1 and 2 on the special verdict during the jury instruction and verdict conference, nor did they argue the circuit court should answer Questions 1 and 2 instead of the jury. The Brekkens could have moved the court at the close of evidence to determine as a matter of law whether Knopf intentionally caused offensive contact with Jacob, and whether Jacob consented to the contact, but they failed to do so. *See* WIS. STAT. § 805.14(4) (permitting a party to "mov[e] the court to find as a matter of law upon any claim or defense or upon any element or ground thereof" at the close of evidence). Because the Brekkens acquiesced in Questions 1 and 2 going to the jury, they cannot now argue the circuit erred by failing to answer those questions as a matter of law.

¶10 The Brekkens contend they did not forfeit their right to argue that the circuit court should have answered Question 2 as a matter of law.[4] We

[3] Although WIS. STAT. § 805.13(3) uses the term "waiver," our supreme court has clarified that "forfeiture" is the proper term for the concept described in the statute. *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419.

[4] The Brekkens do not respond to Knopf's argument that they forfeited their right to argue the circuit court should have answered Question 1 as a matter of law. Arguments not refuted are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

disagree. During the jury instruction and verdict conference, the court specifically asked the Brekkens' attorney, "[W]hat's your position on whether or not consent is to be decided by the jury?" Counsel responded he believed consent "should [not] be an issue" because a child Jacob's age is incapable of consenting to sexual contact as a matter of law. Nevertheless, counsel then agreed that the court could include Question 2 on the special verdict. Although counsel stated he reserved the right to challenge Jacob's legal capacity to consent if the jury answered Question 2 in the affirmative, we do not believe counsel's purported reservation of the right to argue the consent issue was sufficient to avoid forfeiture. We agree with Knopf that a party "does not preserve its position for appeal by foregoing a court ruling when the matter is before the court and agreeing the court can proceed in an adverse manner [but] saying [the party] reserve[s] a right to flip positions."

¶11 In addition, any error in failing to answer Question 2 as a matter of law was harmless under WIS. STAT. § 805.18(2), which states a court will not reverse a judgment based on an error that did not affect a party's substantial rights. For an error to affect a party's substantial rights, there must be a reasonable possibility that the error contributed to the outcome of the action. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶52, 246 Wis. 2d 132, 629 N.W.2d 301. Here, the claimed error regarding Question 2 did not affect the outcome of the action because, even if the court had answered Question 2 in the negative, the battery claim still would have failed due to the jury's negative answer to Question 1. Consequently, the court's failure to answer Question 2 did not affect the Brekkens' substantial rights, and any error was harmless.

II. Jury instruction on consent

¶12 The Brekkens also argue the circuit court erred by failing to instruct the jury that children under sixteen are legally incapable of consenting to sexual activity. The court instead instructed the jury, "In deciding whether Jacob Brekken gave consent, you should consider his age at the time he is claimed to have given consent and whether a person of that age had the capacity to give consent."

¶13 The Brekkens have forfeited their right to challenge the jury instruction on consent. At the jury instruction and verdict conference, the Brekkens argued, as a general matter, that children under sixteen are incapable of consenting to sexual activity. In support of this argument, they cited ***Beul v. ASSE International, Inc.***, 233 F.3d 441, 450 (7th Cir. 2000), which held it was permissible to instruct a jury on the age of consent prescribed by Wisconsin's criminal statutes in a civil case involving a sexual relationship between a sixteen-year-old girl and forty-year-old man. However, the Brekkens did not propose any specific jury instruction on the age of consent based on ***Beul***. Instead, their attorney simply made the general statement, "I think that the jury does need to be told what the age of consent is in Wisconsin[.]" The circuit court later proposed the consent instruction that was ultimately given to the jury. The Brekkens' counsel stated he reserved a right to argue the consent issue if the jury ultimately determined that Jacob consented, but he confirmed he had no objection to the court's proposed instruction. By agreeing to the consent instruction proposed by the court, the Brekkens forfeited their right to challenge that instruction on appeal. *See* WIS. STAT. § 805.13(3).

¶14 Moreover, any error in failing to instruct the jury that children under sixteen are incapable of consenting to sexual activity was harmless. *See* WIS. STAT. § 805.18(2). Because the jury answered Question 1 on the special verdict in the negative, it did not have to answer Question 2, which asked whether Jacob consented to the contact with Knopf. As a result, the claimed error regarding the consent instruction did not affect the outcome of the trial and, accordingly, did not affect the Brekkens' substantial rights.[5] *See* ***Nommensen***, 246 Wis. 2d 132, ¶52.

III. Evidence supporting the jury's verdict on the battery claim

¶15 The Brekkens further argue there is "no credible evidence" to sustain the jury's verdict on their claim for battery—offensive bodily contact. Specifically, the Brekkens challenge the jury's answer to Question 1 on the special verdict, which asked whether Knopf intentionally caused offensive contact with Jacob. The Brekkens assert it is undisputed that Knopf intentionally engaged in sexual relations with Jacob, and, accordingly, the only disputed issue presented by Question 1 was whether that contact was "offensive." The jury was instructed the contact was offensive "if a reasonable person [in] Jacob Brekken's situation would have been offended by [it]." The Brekkens argue there was "absolutely no evidence presented at trial that any reasonable child in Jacob's situation would not have been offended" by the contact with Knopf.

¶16 The legal basis for the Brekkens' argument that insufficient evidence supports the jury's answer to Question 1 is unclear. The "no credible evidence"

[5] The Brekkens do not respond to Knopf's arguments that they forfeited their challenge to the jury instruction on consent and that any error regarding the instruction was harmless. Again, arguments not refuted are deemed conceded. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

standard, which the Brekkens cite, is used when a party moves to change a jury's answer to a verdict question. *See* WIS. STAT. § 805.14(5)(c) (permitting a party to move the court to change an answer in the verdict "on the ground of insufficiency of the evidence to sustain the answer"); § 805.14(1) (court may grant a motion to change the jury's answer only if there is "no credible evidence" to support the answer). This suggests the Brekkens are arguing the circuit court erred by failing to change the jury's answer to Question 1. However, the Brekkens never moved the court to change the jury's answer, pursuant to § 805.14(5)(c). Instead, they filed a postverdict motion for a new trial, pursuant to WIS. STAT. § 805.15(1). Because the Brekkens did not ask the court to change the jury's answer to Question 1 in their postverdict motion, they have forfeited their right to raise that argument on appeal. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987) (failure to include alleged errors in a motion after verdict constitutes a forfeiture of the errors).

¶17 The Brekkens may mean to argue that the circuit court should have granted a new trial on the battery claim, pursuant to WIS. STAT. § 805.15(1), because the jury's verdict was contrary to the weight of the evidence. However, the Brekkens do not cite § 805.15(1) on appeal or develop any argument that the jury's verdict met the standard for reversal under that statute. *See* ***Krolikowski v. Chicago & N. W. Transp. Co.***, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979) (circuit court may grant a new trial under § 805.15(1) if the jury's findings are contrary to the great weight and clear preponderance of the evidence). Moreover, whether to grant a new trial under § 805.15(1) is discretionary, *see* ***Krolikowski***, 89 Wis. 2d at 580-81, and the Brekkens do not develop any argument that the circuit court erroneously exercised its discretion. Consequently, even if the Brekkens mean to argue that the circuit court should have granted a new trial

under § 805.15(1) because the jury's answer to Question 1 was contrary to the weight of the evidence, their argument is undeveloped, and we decline to address it.[6] *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

IV. Evidence supporting the jury's verdict on the intentional infliction of emotional distress claim

¶18 Finally, the Brekkens argue there is no credible evidence supporting the jury's verdict on the intentional infliction of emotional distress claim. Specifically, the Brekkens argue there is no evidence to support the jury's answers to Questions 3 and 8 on the special verdict. Question 3 asked, "Was Ann Knopf's conduct intended to cause emotional distress to Jacob Brekken?" Question 8 asked, "Was Jacob Brekken's emotional distress extreme and disabling?" The jury answered both questions in the negative.

¶19 Again, it is unclear whether the Brekkens mean to argue that the circuit court should have changed the jury's answers to Questions 3 and 8, or that the court should have granted a new trial under WIS. STAT. § 805.15(1) because the jury's answers were against the weight of the evidence. However, in this instance, either argument would fail because the Brekkens did not raise *any argument* regarding the intentional infliction of emotional distress claim in their

[6] The Brekkens did file a postverdict motion for a new trial under WIS. STAT. § 805.15(1). However, that motion did not clearly assert the Brekkens were seeking relief on the ground that the jury's answer to Question 1 was against the weight of the evidence. Instead, the Brekkens argued a new trial was warranted because "it was prejudicial error for the court not to answer Question One[.]" (Capitalization omitted.) Thus, if the Brekkens mean to argue on appeal that the circuit court should have granted a new trial because the jury's answer to Question 1 was against the weight of the evidence, it appears they forfeited that argument by failing to raise it in the circuit court. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987) (failure to include alleged errors in a motion after verdict constitutes a forfeiture of the errors).

postverdict motion. Because they failed to raise the argument in their postverdict motion, the Brekkens have forfeited their right to raise any argument regarding the intentional infliction of emotional distress claim on appeal. *See* ***Ford Motor Co.***, 137 Wis. 2d at 417.

CONCLUSION

¶20 As noted above, the Brekkens' briefs on appeal are not a model of clarity, and it is sometimes difficult to discern the precise legal basis for the relief they are seeking. Rather than clearly explaining the legal grounds for their arguments, the Brekkens focus on trying to convince us to establish bright-line rules related to the issues in this case. For instance, they urge us to establish a bright-line rule that the type of contact that occurred between Jacob and Knopf is "offensive contact" as a matter of law. They also ask us to establish a bright-line rule, applicable in civil cases, that a thirteen-year-old is legally incapable of consenting to sexual activity with an adult. Regardless of whether the Brekkens' proposed bright-line rules are warranted by existing law, or whether imposition of them would be good public policy as argued by the Brekkens, we decline to do so. The Brekkens had an opportunity to raise their arguments in the circuit court at the appropriate time. By failing to do so, they forfeited their right to raise the arguments on appeal.

By the Court.—Order affirmed.

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