COURT OF APPEALS
DECISION
DATED AND FILED

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0174

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

LORELL E. SMITH,

PLAINTIFF-APPELLANT,

UNUM INSURANCE CO., OF AMERICA, AND EMERSON ELECTRIC,

INVOLUNTARY-PLAINTIFFS,

V.

WESTWOOD ESTATES, INC., AND EMPLOYERS MUTUAL CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed.*

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

PER CURIAM. Lorell E. Smith appeals from a judgment dismissing his personal injury suit against Westwood Estates, Inc. and its insurer, Employers Mutual Casualty Company. Smith argues that the trial court erred in allowing expert testimony on the meaning of the building code and in not ruling that Westwood had, as a matter of law, violated certain code requirements, that his expert witness's testimony was improperly restricted, that there was no evidence to support the jury's finding that he was 75% contributorily negligent, and that the $20,000 award for pain and suffering was unconscionably low. We conclude that no trial errors occurred and that the jury's verdict is supported by sufficient evidence. We affirm the judgment dismissing Smith's action.

Smith slipped and fell on the first step leading away from the office maintained at Westwood Estates, a mobile home development and rental complex. It was January 22, 1993, and it had been snowing and sleeting. Smith suffered injuries to his shoulder, including a rotator cuff tear and a frozen shoulder. Smith ultimately had surgery on his shoulder.

Smith alleged that Westwood violated the Wisconsin Safe Place Act by maintaining a front porch and staircase which did not conform to requirements of the building code. Smith's expert testified that the handrail was too high, too wide, not continuous and did not extend at least twelve inches above the top step as required by the building code. The expert also indicated that the steps were too steep and lacked the code-required non-slippery surface. Westwood's expert testified that the handrail satisfied both code requirements that rails be continuous and extend twelve inches beyond the top step. He opined that the stairs satisfied the non-slippery surface requirement because they were made of wood, which by nature is non-slippery.

Upon submission of the case to the jury, the trial court instructed that as a matter of law Westwood was negligent with respect to the height of the handrail because of noncompliance with the building code. The trial court ruled that the questions of whether other provisions of the code were violated, that is, whether the handrail was continuous, whether the handrail extended the required twelve inches above the top step, and whether the steps were of a non-slippery material, were issues of fact for determination by the jury. Smith argues that the interpretation of the building code is a question of law which the trial court should have decided and that it was error not to find negligence as a matter of law on all applicable code provisions. He also contends that the opinions of Westwood's expert impermissibly invaded the province of the trial court with respect to interpretation of the building code.

Admission of opinion evidence is a discretionary decision for the trial court. *See* ***Pattermann v. Pattermann***, 173 Wis.2d 143, 152, 496 N.W.2d 613, 616 (Ct. App. 1992). We will uphold the trial court's decision unless the discretion was not exercised or there was no reasonable basis for the trial court's decision. *See* ***Wisconsin Public Serv. Corp. v. Krist***, 104 Wis.2d 381, 395, 311 N.W.2d 624, 631 (1981).

Smith concedes, as he must, that "expert opinions are admissible when they explain the meaning and practical application of the terms of safety orders and where the expert's special knowledge may be deemed helpful to the jury." ***Bellart v. Martell***, 28 Wis.2d 686, 692-93, 137 N.W.2d 729, 732 (1965). Thus, in ***Candell v. Skaar***, 3 Wis.2d 544, 551-52, 89 N.W.2d 274, 278 (1958), expert testimony was admissible to explain the meaning and practical application of the requirement that the steps be made of a non-slippery material.

Smith suggests that the ***Bellart*** and ***Candell*** precedents are no longer applicable because subsequent to those decisions a prefatory note to the building code was approved which states that: "The definitions of words and phrases not defined in this section should be taken from the current edition of Webster's New International Dictionary." *See* Prefatory Note, WIS. ADM. CODE ch. ILHR 51 (1996). However, the precedents have never been overruled. Indeed, the principle that expert testimony is allowed to explain whether a structure is in compliance with terms of art used in a safety code was indirectly reaffirmed in ***Uebele v. Oehmsen Plastic Greenhouse Mfg., Inc.***, 125 Wis.2d 431, 436, 373 N.W.2d 456, 459 (Ct. App. 1985), a case postdating the approved prefatory note.

Moreover, the allowance of expert testimony is governed by § 907.02, STATS.: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Determining whether expert testimony assists the fact finder is a discretionary decision of the trial court. *See* ***State v. Pittman***, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79 (1993).

We first note that Smith's expert testified that certain code provisions had not, in his professional opinion of how the code is interpreted, been complied with. This opened the door for Westwood to present expert testimony. *See* ***Michael R.B. v. State,*** 175 Wis.2d 713, 733, 499 N.W.2d 641, 650 (1993).

Candell, 3 Wis.2d at 551-52, 89 N.W.2d at 278, approves the admission of expert testimony to explain the meaning and practical application of the requirement that the steps be made of a non-slippery material. The other

dispute here was whether the handrail was continuous and extended far enough when it was interrupted by a vertical four-inch square post supporting the porch roof and ended at the top step where it joined a guardrail that ran along the porch. The bare reading of the code would not reveal the meaning of the provisions in the context of the porch and stairs in question. It was a proper exercise of discretion to allow expert testimony on the meaning and practical effect of the code provisions regarding continuity and extension. Additionally, because it was not clear from the evidence whether these code provisions were violated, it was proper for the trial court to submit the issues to the jury. The jury was free to rely on the expert's opinion regarding compliance. *See* ***id.***

Smith next argues that his expert was improperly restricted from testifying about other defects he observed in the porch, stairs and handrail. The trial court ruled that "the area in which he fell is the appropriate area to concentrate on; and the areas away from the fall really have no relevance and would only be offered in order to induce undue prejudice in front of the jury." This ruling comports with the concept of causation and relevancy explained in ***Baker v. Bracker***, 39 Wis.2d 142, 146-47, 158 N.W.2d 285, 287-88 (1968), that the failure to fulfill a statutory duty gives rise to a presumption of causation only when the accident occurs at the spot or place where the defect exists. Proof that there were other defects in the general area is not relevant. *See* ***id.*** The trial court did not erroneously exercise its discretion in limiting the testimony to the points of the stairs where the fall occurred.

Smith contends that there was no evidence to support the finding of contributory negligence. He points out that he was the only witness to his fall and that no other witness at trial suggested that he had acted in an unsafe manner in

descending the stairs. He suggests that the jury's finding was based solely on speculation.

The comparison and apportionment of causal negligence are peculiarly within the province of the jury. *See* ***White v. Leeder,*** 149 Wis.2d 948, 959, 440 N.W.2d 557, 561 (1989). We will uphold the jury's finding if there is any credible evidence to support it. *See* ***Frayer v. Lovell,*** 190 Wis.2d 794, 810, 529 N.W.2d 236, 243 (Ct. App. 1995). Matters of weight and credibility are left to the jury, and where more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the jury. *See* ***id.*** Our consideration of the evidence must be done in the light most favorable to the verdict. *See* ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995). In order to reverse, there must be "'such a complete failure of proof that the verdict must have been based on speculation.'" ***Id.*** (quoted source omitted).

The evidence established that it was a snowy, icy day. Although one cannot be contributorily negligent for simply venturing out on a snowy day in Wisconsin, the conditions made extra caution the order of the day. Smith observed snow on the stairs and yet admitted that he went down the stairs in a "usual fashion." The jury could draw the inference that Smith did not use the extra caution that a reasonably prudent person would when using snowy stairs. The inference is further supported by Smith's testimony that after reporting his fall, he descended the same stairs with more caution by gripping the handrail tighter and proceeding more slowly. Also, others had used the stairs that day without difficulty. There was sufficient evidence to remove the finding of contributory negligence from the realm of speculation.

The final issue Smith raises concerns the $20,000 award for future pain and suffering. Smith contends that the amount is so unreasonably low as to shock the judicial conscience. *See* ***Ollinger v. Grall***, 80 Wis.2d 213, 224, 258 N.W.2d 693, 699 (1977) (even when it appears that the award is low, this court will not interfere with the jury's finding unless the award is so unreasonably low as to shock the judicial conscience).

In reviewing jury awards, we may not substitute our judgment for that of the jury and are limited to determining whether the awards are within reasonable limits. *See* ***Brain v. Mann***, 129 Wis.2d 447, 455, 385 N.W.2d 227, 231 (Ct. App. 1986). If there is any credible evidence to support the jury's finding as to the amount of damages, we will not disturb the finding unless the award is so unreasonably low that it shocks the judicial conscience. *See* ***id.***

The seriousness of Smith's injury was called into question. Smith testified that in the afternoon following his fall, he snowblowed his brother's driveway. He also admitted that he shoveled snow after the accident and prior to having back surgery in the summer of 1993. Smith testified that work accommodations had been made because of his inability to do certain tasks. Smith's supervisor indicated that no accommodations had been made. The jury was free to reject Smith's proof about the pain he experiences and the effects of the injury. We are not shocked by the award of damages.

By the Court.—Judgment affirmed.

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