COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 1998

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. 97-1111

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

DAVID MARTINEZ AND DELIA MARIN MARTINEZ,

PLAINTIFFS-APPELLANTS,

HERITAGE MUTUAL INSURANCE COMPANY,

PLAINTIFF,

V.

BERTA SHERWOOD, C.E. SHERWOOD AND VIGILANT INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

HERITAGE MUTUAL INSURANCE COMPANY AND SCOTT DAVIS, D/B/A DAVIS SOD & LANDSCAPING COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. David Martinez and Delia Marin Martinez appeal from a judgment dismissing their claims against homeowners Berta and C.E. Sherwood and their insurer, and landscaper Scott Davis and his insurer,[1] after a jury found that David Martinez was 100% contributorily negligent when he fell on the Sherwoods' snow-covered driveway while collecting garbage. On appeal, Martinez argues that the trial court erroneously excluded his expert witness from testifying at trial. Because we conclude that Martinez did not present all of his arguments in favor of the proffered expert testimony at the motion in limine hearing, we affirm the trial court's discretionary decision to exclude the expert. We also reject Martinez's challenge that the jury verdict was perverse.

In the early afternoon of January 27, 1994, Berta Sherwood found Martinez lying on her driveway near an empty trash can and called 911. When emergency medical technicians arrived, snow and freezing rain were falling. The Sherwoods' driveway was snow-covered and in poor condition. The Sherwoods had an agreement with Scott Davis, d/b/a Davis Sod & Landscaping Company, to plow, salt and sand their driveway on an as-needed basis. The driveway had been plowed on January 26, the day before Martinez fell. Martinez testified that he did not remember any of the events of the day he fell. He suffered an aggravation of a pre-existing injury and a lengthy rehabilitation period.

The Sherwoods and the landscaper moved in limine to bar Martinez from presenting expert testimony relating to the condition of the driveway because such information is within the common knowledge of jurors living in Wisconsin.

[1] Davis and his insurer are not respondents on appeal.

The trial court agreed with the movants and excluded the expert's testimony. The jury found Martinez 100% causally negligent in his fall. Martinez renewed his arguments in favor of expert testimony at the hearing on postverdict motions. The trial court rejected these arguments after concluding that Martinez's postverdict rationale for expert testimony differed from his pretrial rationale. Martinez appeals.

We conclude that a careful comparison of the transcripts of the pretrial and postverdict[2] hearings reveals that Martinez changed the focus of his pretrial argument on expert testimony by the time the parties appeared at the postverdict hearing.

At the hearing on the motion in limine, the defense argued that Martinez's expert, an engineer, would not offer any information which was beyond the knowledge of Wisconsin jurors. In particular, the defense noted that fact witnesses would testify that the Sherwoods' driveway was snow-covered and slippery. The jurors would not require similar testimony regarding the condition of the driveway from an expert.

In response, Martinez argued that the engineer would testify as an accident reconstruction expert to show that Martinez fell on the driveway and to address "essentially what could have been done within what time limits to prevent this accident from occurring." In this regard, Martinez mentioned "complicating factors" such as an intervening snow fall and the large area of the driveway which was involved. Martinez also cited:

[2] Although the transcripts refer to the parties' written submissions for both hearings, these materials are not included in the record on appeal. Accordingly, we confine our analysis to the transcripts.

> [V]arious methods that could have been used to prevent this accident whether it's snow or salt. We have time periods within which these things could have been applied, how much they could have been applied. What the cost of applying them was, and what measures would have been reasonable to accomplish this task.

In response to further questioning by the court regarding the purpose of the expert testimony, Martinez stated that he expected the landscaper to argue that he plowed the day before and left the driveway in fair condition. In relation to that anticipated defense, Martinez posed the following questions for which expert testimony would be helpful: what was the condition of the driveway before it was plowed on January 26, whether and how much salt should have been applied, how long salt lasts, how simple it would have been to take preventative measures, the cost of preventative measures, and the impact if such measures had been taken the night before the accident or the morning of the accident. Later in the argument Martinez emphasized the weather and the effectiveness of salt on the area where he fell. The defense reiterated that Wisconsin jurors understand the purpose and operation of salt and sand and that expert testimony was unnecessary in this regard.

The trial court considered § 907.02, STATS., which permits expert testimony if it will assist the trier of fact to understand the evidence. The court then recited its understanding of the purpose of the expert's proffered testimony.

> The first [purpose] is to assist the trier of fact in understanding the evidence because Mr. Martinez himself cannot recall the incident or how it happened. And that in order to explain the facts of how this happened expert testimony is necessary. The second purpose for which it is offered as the Court understands it is to describe preventative measures that could have been taken and to evaluate their cost and effectiveness and so on.

The court determined that the subject of the second purpose of the expert's testimony (clearing the driveway and the effectiveness of salt and sand) was within the common knowledge and experience of Wisconsin jurors (as the expert had conceded at his deposition) and that the facts surrounding the occurrence of the accident could be addressed by fact witnesses and inferences drawn from their testimony. The court concluded that expert testimony would not assist the jury in determining whether Martinez fell on the Sherwoods' driveway or in evaluating the measures which would have been available to the Sherwoods and the landscaper to address the condition of the driveway.

At the hearing on postverdict motions, Martinez sought a new trial on the grounds that the trial court should have admitted expert testimony designed to address the length of time ice was present on the driveway before Martinez's fall. Martinez contended that the ice had been on the driveway for several days and that the Sherwoods and the landscaper were negligent for not timely addressing the hazardous situation. Martinez argued that expert testimony was necessary to address this issue and that none of the other fact witnesses at trial could have addressed this issue.

The trial court responded that Martinez did not argue this basis for admitting expert testimony at the pretrial hearing. The court noted that the pretrial written arguments discussed reconstructing the accident, contributing factors to the accident, the condition and physical characteristics of the driveway, various means of addressing the slipperiness of the driveway, the effectiveness and cost of these means, and the impact of the weather on the accident. However, the court could not locate any argument in the written submissions claiming that an expert was needed in order to establish how long the driveway had been icy and snow-covered prior to the accident. Martinez admitted that he either did not specifically

suggest or insufficiently emphasized this basis for admitting the expert's testimony at the pretrial hearing. The court concluded that Martinez was offering a new basis for admitting the testimony and that this argument was waived for not having been made at the pretrial hearing or during trial as the evidence unfolded.

On appeal, Martinez points to portions of the pretrial hearing transcript which he claims should have signaled the trial court that the expert testimony was also offered for the purpose outlined at the postverdict hearing. Martinez contends that the defense theorized that the snow fell only the night before the accident and Martinez needed expert testimony about how long the snow was in place and what steps could have been taken to remedy the hazardous situation.

A party must raise and argue an issue with some prominence in order to allow the trial court to address the issue and make a ruling. *See* ***State v. Ledger,*** 175 Wis.2d 116, 135, 499 N.W.2d 198, 206 (Ct. App. 1993). The question is whether the party has raised an issue with sufficient prominence such that the court understands what it is being asked to rule upon. *See* ***State v. Barthels,*** 166 Wis.2d 876, 884, 480 N.W.2d 814, 818 (Ct. App. 1992), *aff'd*, 174 Wis.2d 173, 495 N.W.2d 341 (1993). We apply these principles to this case.

We disagree with Martinez that his postverdict basis for expert testimony was argued with sufficient prominence at the pretrial hearing. Martinez's isolated pretrial comments regarding the condition of the driveway before the day of the accident are unavailing on appeal. At the pretrial hearing, the trial court summarized Martinez's offer of proof regarding expert testimony as relating to accident reconstruction and preventative measures. Martinez did not

correct the trial court or offer additional information at the time the court was ruling on the motion or at any point during the trial.

Having concluded that Martinez waived the argument for expert testimony he subsequently made on postverdict motions, we also conclude that the trial court properly exercised its discretion in excluding the expert's testimony for the purposes proposed at the pretrial hearing. The exclusion of evidence is within the discretion of the trial court and its rulings in that regard will not be overturned on appeal absent an erroneous exercise of discretion. *See* ***Gonzalez v. City of Franklin,*** 137 Wis.2d 109, 139, 403 N.W.2d 747, 759 (1987). The term "discretion" contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards. *See* ***Christensen v. Economy Fire & Cas. Co.,*** 77 Wis.2d 50, 55-56, 252 N.W.2d 81, 84 (1977). The trial court concluded that the expert testimony would not assist the jurors because the information to be provided by the expert was within their common knowledge and experience or could otherwise be provided by fact witnesses. The trial court exercised its discretion and applied the proper legal standard. *See* § 907.02, STATS.

Martinez argues that the jury's verdict that he was solely negligent in the accident is contrary to the evidence and therefore perverse. If a jury's finding of no liability is supported by credible evidence, the failure to award damages does not necessarily render the verdict perverse. *See* ***Jahnke v. Smith,*** 56 Wis.2d 642, 652, 203 N.W.2d 67, 73 (1972). On motions after verdict, the trial court reviewed the evidence adduced at trial which supported the jury's verdict. The court noted the evidence from which the jury could have inferred that Martinez did not exercise due care for his own safety—that the condition of the driveway was apparent to rescue workers and that Martinez had previously negotiated the

driveway that afternoon without incident. The trial court found that this evidence permitted an inference that Martinez was not carefully navigating the driveway when he fell.

Finally, Martinez moves this court for a new trial. Because we have rejected Martinez's individual claims for relief, we reject his final catch-all plea for discretionary reversal based on the cumulative effect of nonerrors. *See* ***State v. Marhal***, 172 Wis.2d 491, 507, 493 N.W.2d 758, 766 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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