COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0661

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

KENT KOWALSKI,

PLAINTIFF-APPELLANT,

MOHICAN NATION INSURANCE FUND,

INTERESTED PARTY-PLAINTIFF,

V.

CITY OF WAUSAU AND WAUSAU INSURANCE COMPANIES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND THUMS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Keith Kowalski appeals a judgment dismissing his slip and fall action against the City of Wausau. He argues that (1) the trial court

erroneously ruled that WIS. STAT. § 81.15 (1995-96) defeated his claim;[1] (2) the form of the verdict was improper; (3) the court erroneously denied his motion to change the jury's answer to a verdict question, and (4) it erroneously denied his motion for a new trial based upon an inconsistent verdict.[2] We reject his arguments and affirm the judgment.

FACTS

¶2 Kowalski's attorney summarized the facts and his liability theory in his opening statements to the jury:

> Back on February 24th of 1996, my client, Kent Kowalski, decided to go out. He went out. He went to a bar. He had some beers, decided that it would not be anything but the prudent thing to walk back home.
>
> … [H]e walked the course of a mile, and … walked down here to Third Street. … And there was a place—it's a fairly old building. … And there he encountered some crunchy ice ….
>
> He felt that the lighting wasn't too good, thought he could continue to walk. The ice then became glazed. He will describe that as a mound of ice. That mound of ice caused his foot to slip. It went out from under him.
>
> You will hear the doctor testify about the type of twisting action that occurred. He ended up having a comminuted fracture of his left leg ….
>
> ….

[1] "No action may be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless the accumulation existed for 3 weeks." WIS. STAT. § 81.15 (1995-96). Except for § 81.15, all references to the Wisconsin Statutes are to the 1997-98 version.

[2] Kowalski's statement of "Issues Presented" do not match his outline of and headings for his arguments. Because his statement of issues varies from his statement of arguments, we derive our characterization of his arguments from their substance rather than their headings. *See* ***State v. Waste Management of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

> I'm going to have two, possibly three people tell you that that ice had been there for a considerable time period. Most of the winter that was covered with ice. They will tell you that that ice had been there for at least 21 days of accumulation.
>
> Unfortunately the property owner—and it's not clear if anyone ever lived there at the time—did nothing about it, unfortunately, and that's why we're here. The city didn't do anything about it either. And he fell on that … he walked that distance until he got to that location where that ice was, and then he fell.

¶3 Kowalski's attorney called three witnesses who testified that they were familiar with the sidewalk where Kowalski fell and, at the time in question, the sidewalk was "real icy," "very icy," and "icy, slippery and snowy" for at least a month. Kowalski testified that as he was walking on the sidewalk, he "heard ice crunching" and all of the sudden his feet went out from under him. He described the area where he fell as "glazed ice." Kowalski's mother testified that Kowalski said that he had fallen on ice. After her testimony, Kowalski rested.

¶4 The City called its sidewalk inspector, David Tanck, to testify in its defense. Tanck testified that 1996 was a record snow fall year and that between February 6 and 10, relatively warmer temperatures caused a thaw. He testified further that on February 23, Wausau received an inch of freezing rain and "everything was iced up in the City of Wausau." The high for the day was thirty-six degrees and the low was eighteen degrees. On February 24, Wausau received one-tenth inch of snow and sleet.

¶5 In closing arguments, Kowalski's counsel argued:

> What we have here is a bad sidewalk. What we have here is an accumulation of snow and ice. And there may have been an additional layer that went on top of it, but would it have been that bad? Would it have created the problem of an uneven mounded surface? No ….

> ….
>
> The cause of this is that after accumulating for that length of time, it just got a little bit bigger.
>
> … He got to that mound, uneven, boom, down he goes.

Counsel argued that the accumulation existed for at least twenty-one days prior to the fall.

¶6 The trial court's instructions to the jury included WIS JI—CIVIL 8035.[3] In addition, the trial court instructed: "Wisconsin law provides that a municipality may be negligent if there is an accumulation of snow and or ice on a sidewalk that existed for 21 days prior to the accident."[4]

¶7 The jury returned a verdict finding both the City and Kowalski causally negligent. It attributed fifty percent negligence to each. The last question

[3] WIS JI—CIVIL 8035 reads:

> HIGHWAY OR SIDEWALK DEFECT OR INSUFFICIENCY
>
> Every municipality has the duty to exercise ordinary care to construct, maintain, and repair its [sidewalks] so that they will be reasonably safe for public travel. This duty does not require the municipality to guarantee the safety of its [sidewalks] or render them absolutely safe for all persons who travel upon them. It suffices if they are [maintained] so as to be reasonably safe.
>
> A [sidewalk] is defective when it is not [maintained] so as to be reasonably safe for anticipated public use.
>
> (However, before you may find the municipality negligent because of the existence of any such defective condition, you must first find that the municipality through its officers or employees had either actual notice of the defect, or constructive notice thereof, because it had existed for such a length of time before the accident that the municipality through its officers and employees in the exercise of ordinary care should have discovered it in time to remedy the defect.)

[4] Kowalski does not challenge the jury instructions.

of the verdict asked: "Did the accumulation of snow and ice exist for at least 21 days prior to the fall of the plaintiff, Kent Kowalski?" The jury answered "No."

¶8 At motions after the verdict, the trial court concluded that the jury's finding, that the snow and ice had not existed for twenty-one days, defeated Kowalski's negligence claim pursuant to WIS. STAT. § 81.15. The court found that the record did not support a finding of negligence based on any theory of liability other than the accumulation of snow and ice. The court concluded that the way the case was tried, the jury found in favor of the City, and entered judgment on the verdict, dismissing Kowalski's claim.

ARGUMENT

1. The application of WIS. STAT. § 81.15.

¶9 Kowalski argues that because one of his liability theories at trial was that he fell on an artificial accumulation of ice and snow due to the cracked and defective sidewalk, the twenty-one-day time frame in WIS. STAT. § 81.15 does not apply. We disagree. The record fails to support his claim that he proceeded on a theory of an artificial accumulation of ice and snow. Accordingly, we conclude that the trial court correctly determined that § 81.15 defeats his claim.

¶10 WISCONSIN STAT. § 81.15 gives individuals the right to commence damage suits against municipalities for injuries sustained as a result of the "insufficiency or want of repairs of any highway which any town, city or village is bound to keep in repair." ***Damaschke v. City of Racine***, 150 Wis. 2d 279, 283, 441 N.W.2d 332 (Ct. App. 1989). The term "highway" in this statute includes sidewalks. *See* ***id***. "The statute further accords a municipality a limited three-week period of immunity: 'No action may be maintained to recover damages for

injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless the accumulation existed for 3 weeks.'" ***Id***. at 283-84 (quoting WIS. STAT. § 81.15).

¶11 An accumulation of ice or snow is a natural incident of the climate in Wisconsin during winter months. *See* ***Stippich v. City of Milwaukee***, 34 Wis. 2d 260, 268-69, 149 N.W.2d 618 (1967); *see also* ***Hyer v. City of Janesville*** 101 Wis. 371, 374, 77 N.W. 729 (1898). A city may be liable for damages for injuries sustained by reason of a natural ice or snow accumulation upon any sidewalk, if the accumulation existed for more than three weeks. *See* ***Stippich***, 34 Wis. 2d at 271.

¶12 Kowalski correctly asserts that the three-week period of immunity set forth in WIS. STAT. § 81.15 does not apply to artificial accumulations of ice. An accumulation of ice is "artificial" when water has been discharged or diverted from another source or when it has been allowed to accumulate due to negligent omissions, such as the failure to keep a drainage system in repair. *See* ***Sambs v. City of Brookfield***, 66 Wis. 2d 296, 306, 224 N.W.2d 582 (1975).

¶13 For example, in ***Laffey v. City of Milwaukee***, 4 Wis. 2d 111, 89 N.W.2d 801 (1958), a slippery sidewalk was caused by firemen who discharged water on the sidewalk and allowed it to freeze. Our supreme court stated: "We cannot believe the legislature intended to provide such a period of absolute immunity in cases where the city itself has negligently created the icy condition." ***Id***. at 115.

¶14 Also, in ***Sambs***, witnesses testified that driveway culverts were inadequate and ditches overflowed onto the road. They had complained to the city

about the problem on numerous occasions in the twenty-two years they lived there, but nothing was ever done. An engineer for a private consulting firm testified the culverts under the driveways were inadequate, causing flooding on the road. Based on this and other testimony, the jury found that the city was thirty percent causally negligent in failing to properly maintain and repair the highway and surface drains. *See* ***id***. at 303.

¶15 Our supreme court affirming the trial court's decision not to instruct the jury on WIS. STAT. § 81.15 explained:

> The purpose of the three-week requirement of sec. 81.15, Stats., was … to give the municipalities plenty of opportunity to learn of and remove snow and ice resulting from natural precipitation, not to provide immunity for cases where the municipality has itself negligently created the icy condition. … The ice in this case was allegedly on the road only because of the negligently maintained drainage system; a condition that was known or should have been known to the defendant long before the incident in question, at least because of the numerous complaints.

Id. at 307.

¶16 Here, however, in contrast to ***Sambs*** and ***Laffey***, the theory that the icy condition was caused by an artificial accumulation of ice and snow was not raised at trial. There was no testimony specifically relating to an "artificial" accumulation of snow and ice. The only questions relating to the sidewalk's underlying condition were as follows: First, counsel asked Kowalski:

> Q. I'm just going to ask a couple more questions about the area where this accident occurred. Do you recall the condition of the sidewalk after the ice had gone away, the snow? … [C]an you tell us what that area is like?
>
> A. It's a crack—it's cracked up cement that—I don't know when it was patched, but there is certain areas that have like blacktop put over the cracked up cement.

> Q. All right. And can you tell us specifically where you fell, what that area was like in terms of the ice?
>
> A. Just glazed ice [indicating a couple or three to four inches thick].

¶17 On cross-examination of Tanck, Kowalski's counsel asked whether Tanck had observed the sidewalk's condition after everything had melted and cleared off. Tanck did not recall. Counsel then asked:

> Q. And if somebody were to testify that in fact that area was patched, irregular, and actually had concrete that was missing or had holes in it, would you be in any position to deny that?
>
> A. No.
>
> Q. And in fact, that would create even more of a problem with accumulated snow and ice because it would tend to puddle based upon your experience, wouldn't it?
>
> A. It's possible.

¶18 Kowalski argues, without citation to the record or authority, that "[a] natural accumulation of snow in that area would have only resulted in a uniform area rather than the uneven and different snow and ice which the plaintiff testified to." We are unpersuaded. The testimony cited fails to support Kowalski's claim that he proceeded on a liability theory based on artificial ice or snow accumulation. Although Kowalski's testimony indicated that there were cracks patched with asphalt, there was no testimony that they prevented drainage, led to an artificial accumulation of ice, or in any way contributed to his fall.

¶19 Tanck's testimony is equally unsupportive. First, Tanck did not recall viewing the sidewalk in question and was unable to testify to its condition. He testified that freezing rain "could build up" to form an icy mound. Although he agreed that a "patched, irregular" area with "concrete that was missing or had holes" *possibly* could "create *even more of a problem* with accumulated snow and

ice because it would tend to puddle," (emphasis added), there is no testimony that the sidewalk in question had holes or unevenness that artificially caused the mound of glazed ice on which Kowalski fell.[5]

¶20 The trial court stated:

> I was basically led by both parties to believe that this case would be tried on the basis of a snow and ice accumulation, and that was the way I addressed my view of the jury instructions as well as the verdict. I don't recall any real discussion at any time during this case about uneven sidewalks or artificial accumulations. I don't remember anything of that.[6]

¶21 The trial court was correct. There was no testimony or argument relating to uneven sidewalks causing artificial accumulations. Kowalski's pleadings refer merely to an ice-covered sidewalk, and the City's negligence based upon failure to warn, inspect, maintain, and provide "a safe sidewalk." The pleadings did not mention an artificial accumulation of ice or snow, nor facts pled from which this inference could be made.[7] Also, Kowalski's attorney did not mention the issue in opening or closing arguments.

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[5] Asking the jury to make a finding of artificial accumulation based on the record before us would be asking the jury to speculate. *See* ***Home Savings Bank v. Gertenbach****,* 270 Wis. 386, 404, 71 N.W.2d 347 (1955) ("Building an inference upon an inference" is speculation.).

[6] The record does not include a transcript of the motions after verdict. However, Kowalski included a copy in his appendix. Although we generally do not consider matters outside the record on appeal, *see* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981), a party's unrefuted contentions may be deemed admitted. *See* ***Charolais Breeding Ranches v. FPC Securities***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Because the City does not object to the contents of Kowalski's appendix, we include it in our consideration of the record.

[7] We do not mean to imply that the pleadings are insufficient to state a claim for relief. We simply conclude that they fail to support Kowalski's contention that he alerted the trial court to a theory based upon an artificial accumulation of ice and snow.

¶22 The thrust of the trial was that the accumulation of ice and snow existed for more than twenty-one days, implying that the ice accumulation occurred naturally. The testimony cited, particularly in the absence of any argument, was insufficient to alert the court that one of the liability theories was that the ice accumulation was artificial and therefore WIS. STAT. § 81.15 did not apply.[8] Because the jury's finding, that the ice had not existed for twenty-one days, completely undermines the City's liability, the trial court correctly applied § 81.15 and dismissed his claim. *See* ***Dahl v. K-Mart,*** 46 Wis. 2d 605, 610, 176 N.W.2d 342 (1970).

2. Form of verdict.

¶23 Next, Kowalski argues that the form of the verdict was improper because the court erroneously included the last question whether the ice accumulated for more than twenty-one days. Without citation to the record, he contends that he objected to the last question as surplusage. He also argues that a "depression created on the uneven patchwork and damaged concrete that existed was the area in which the snow and ice accumulated artificially and resulted in the accident."[9] The record simply fails to illuminate that this contention was made at trial. It also fails to show Kowalski raised an objection to the form verdict. *See*

[8] Kowalski's appellate briefs fail to direct us to any portion of the trial record where he alerted the court to his theory based upon an artificial, rather than natural, ice accumulation.

[9] *See* WIS. STAT. § 809.19(1)(e). "[W]e decline to embark on our own search of the record, unguided by references and citations to specific testimony, to look for … evidence to support [the argument]." ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). We have held that where a party fails to comply with the rule, "this court will refuse to consider such an argument …." "[I]t is not the duty of this court to sift and glean the record *in extenso* to find facts which will support an [argument]." ***Id***.

WIS. STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.").

¶24 The transcript of the verdict and instruction conference reads:

> [KOWALSKI'S COUNSEL]: I've reviewed the instructions and the verdict, and I have no problems with them in their present shape.

After some discussion, the trial court asked whether anyone had any problems with the verdict. Kowalski's counsel responded: "Well, your Honor, I already stated I didn't think we needed the last question on it. Other than that, I don't have any objections."[10]

¶25 Counsel must state objections and "the grounds for objection with particularity on the record." WIS. STAT. § 805.13(3). "This court has stated that, in 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." ***Air Wisconsin, Inc. v. North Central Airlines***, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980); *see also* ***State v. Wedgeworth*****,** 100 Wis. 2d 514, 528, 302 N.W.2d 810 (1981) ("It is fundamental to sound trial practice that objections must be made promptly and in terms which apprise the court of the exact grounds upon which the objection is based.") (citations omitted). Because the record fails to reveal that Kowalski stated on the record his specific objection to the form of the verdict and grounds for his objection, we conclude that his objection is waived pursuant to § 805.13(3).

[10] Counsel may be referring to an off the record conversation. Objections made off the record are insufficient to preserve claim of error. *See* ***Steinberg v. Jensen***, 204 Wis. 2d 115, 121, 553 N.W.2d 820 (Ct. App. 1996).

¶26 Even if Kowalski's objection were preserved, it would have no merit. "[T]he form of the verdict rests in the sound discretion of the trial court, not to be interfered with so long as the issues of fact in the case are covered by appropriate questions." ***Dahl***, 46 Wis. 2d at 609. Given the nearly complete preoccupation with the issue whether the ice existed for more than twenty-one days, it was reasonable for the trial court to put the question to the jury. *See* ***id***.; *see also* ***Trobaugh v. City of Milwaukee***, 265 Wis. 475, 486, 61 N.W.2d 866 (1953).

3. Sufficiency of evidence.

¶27 Next, Kowalski argues that the trial court erroneously refused to change the jury's answer to the last verdict question that inquired: "Did the accumulation of snow and ice exist for at least 21 days[.]" He argues that no credible evidence supports the jury's negative answer and the sidewalk inspector's testimony did not rebut the four witnesses who testified that the ice existed for more than twenty-one days.

¶28 We disagree. Matters of weight and credibility of evidence are left to the jury, not the appellate court. *See* ***Staehler v. Beuthin,*** 206 Wis. 2d 610, 617-18, 557 N.W.2d 487 (Ct. App. 1996). The jury was not required to accept Kowalski's version of the facts. It is evident that members of the jury disbelieved Kowalski, his neighbor, and the neighbor's two relatives who testified that the icy condition of the sidewalk existed for more than twenty-one days. Instead, consistent with the sidewalk inspector's testimony, they concluded that the glazed ice mound resulted from a recent thaw and rainfall combined with freezing temperatures the day before the injury. We conclude that sufficient evidence supported the jury's answer to the verdict's last question.

4. New trial.

¶29 Finally, Kowalski argues that he is entitled to a new trial in the interest of justice and because the verdict was contrary to law and the great weight of the evidence. Kowalski relies on his previous arguments that we have already rejected and, therefore, we reject them as a basis for a new trial without further discussion.

¶30 Additionally, Kowalski argues that the verdict was inconsistent. An inconsistent verdict is one in which the jury answers are logically repugnant to one another. *See* ***Becker v. State Farm Mut. Auto. Ins. Co***., 141 Wis. 2d 804, 821, 416 N.W.2d 906 (Ct. App. 1987). Kowalski contends that the jury was "told that the snow and ice need be there 21 days for the City to be negligent." He argues that because the jury found the City negligent, but also found that the snow and ice had not existed for twenty-one days, the verdict was inconsistent, requiring a new trial in the interest of justice.

¶31 We are unpersuaded. WISCONSIN STAT. § 81.15 "accords a municipality a limited three-week period of immunity[,]" ***Damaschke***, 150 Wis. 2d at 283; it does not define negligence. The court instructed the jury that "a municipality may be negligent" if the icy conditions existed for twenty-one days. The court did not instruct the jury that the icy conditions must exist for twenty-one days for the City to be negligent. It did not instruct that the municipality could not be negligent if the conditions existed for fewer than twenty-one days. The difference between the actual instruction given and Kowalski's premise is more than semantics. Nothing in the court's instructions prohibited the jury from concluding that the municipality was negligent when it took no steps to salt, sand or otherwise alleviate the icy conditions in a shorter time frame following a

freezing rainfall. Therefore, the jury's findings, that the City was negligent, but that the icy conditions existed fewer than twenty-one days, are not logically repugnant. Because Kowalski's premise mischaracterizes the instruction actually given, his argument fails.

CONCLUSION

¶32 Given the difficulty in determining whether a particular accumulation of snow or ice on a sidewalk has come from natural causes, or whether it will be deemed artificial, the few questions asked about cracks and possible puddles were insufficient to raise the issue, particularly absent argument to that effect. Given the record before us, the court properly determined that Kowalski's liability theory was premised on a natural ice accumulation and defeated according to WIS. STAT. § 81.15. We further conclude that Kowalski's objection to the form of the verdict was not preserved for appellate review, that credible evidence supported the jury's finding that the ice had not existed for more than twenty-one days, and that the verdict was not logically inconsistent. Therefore, Kowalski is not entitled to a new trial in the interest of justice.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.