COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 2001

Cornelia G. Clark
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.

No. 00-2409

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

SUSANNE M. FULGHUM,

PLAINTIFF-APPELLANT,

V.

GENERAL MOTORS CORPORATION,

DEFENDANT-RESPONDENT.

ROBERT H. SCHEER,

PLAINTIFF-APPELLANT,

V.

GENERAL MOTORS CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Robert H. Scheer and Susanne M. Fulghum appeal from a judgment entered on a jury verdict dismissing their products liability claim against the General Motors Corporation. They filed this claim after Scheer's 1994 GMC Jimmy sports utility vehicle rolled over during an automobile accident. Scheer and Fulghum allege that the trial court erroneously exercised its discretion when it prematurely terminated their counsel's rebuttal argument. We agree and reverse for a new trial. Scheer and Fulghum also claim that the trial court erred when it: (1) refused to submit a failure to warn theory of liability to the jury; (2) excluded from evidence a dynamic test that determines a vehicle's propensity to rollover; (3) excluded learned treatises from evidence; (4) imposed what Scheer and Fulghum claim is an ambiguous deadline for the submission of exhibits; and (5) allowed an investigating police officer to give opinion testimony about the cause of the rollover accident. Scheer and Fulghum also claim that they are entitled to a new trial in the interests of justice. In light of our resolution of the first claim of trial-court error, we will not discuss the remaining issues. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

I. BACKGROUND

¶2 Robert H. Scheer and Susanne M. Fulghum were injured when Scheer's 1994 GMC Jimmy sports utility vehicle rolled over during an automobile accident. At trial, Scheer testified that the accident occurred at the intersection of

Greenfield Avenue and Moorland Road. Scheer was driving and Fulghum was next to him in the front passenger seat. Scheer was traveling east down Greenfield Avenue through a green light at a speed of between 35 to 40 miles per hour when a Ford Tempo driven by Jason Lieske turned left from the west-bound side of Greenfield Avenue into the driver's side door of Scheer's GMC Jimmy.

¶3 Upon impact, the GMC Jimmy slid across the intersection, and, as it was doing so, tilted up on its two right side wheels, rolled over, and came to rest upside-down just beyond the intersection. Scheer testified that he tried to keep the GMC Jimmy "going straight," but it flipped over. Both Scheer and Fulghum were injured.

¶4 Scheer and Fulghum sued General Motors alleging strict liability and negligence claims.[1] Specifically, they claimed that the design of the GMC Jimmy was defective because it increased the risk of a rollover during an accident. Scheer and Fulghum also claimed that General Motors failed to warn consumers that larger tires, which were part of an optional package, would raise the height of the vehicle, thus increasing the risk of a rollover. Finally, they claimed that General Motors failed to warn consumers that there was an increased risk of a rollover during a side impact collision.

¶5 The case was tried before a jury on the design-defect theory.[2] During closing arguments, the attorney for General Motors argued that the

[1] Scheer and Fulghum's claims were consolidated before trial. Scheer and Fulghum also filed a claim against Jason Lieske, the driver of the car that hit them. The jury found that Lieske was 100 percent negligent in causing the plaintiffs' injuries. We will not discuss this claim, however, because it is not at issue on this appeal.

[2] At a pre-trial hearing, the trial court ruled that the plaintiffs' expert would not be allowed to testify on the failure-to-warn issue because the case was a "design" defect case rather (continued)

plaintiffs incorrectly characterized evidence regarding tires and track width. When the plaintiffs' attorney responded during rebuttal argument, stating "perhaps again counsel didn't remember exactly what the evidence was," the attorney for General Motors objected, claiming that this argument was improper. The trial court sustained the objection and the plaintiffs' attorney rephrased his argument. At this point, the trial court abruptly cut him off, stating "[c]ounsel, you may have a seat. Thank you. Have a seat. Thank you, very much." Counsel was unable to finish his rebuttal argument.

¶6 After the jury retired, plaintiffs' counsel objected to the trial court's decision to end rebuttal argument and asked the trial court to bring the jury back to hear the remainder of his argument. He also asked the trial court to instruct the jury to disregard the incident. The trial court declined to do so, finding that the plaintiffs' attorney's statement after its ruling was in "open defiance to [its] ruling[]." It concluded that the only remedy for such a violation was to terminate the argument because the plaintiffs' attorney "waive[d]" the right to "present any further argument."

¶7 The jury returned a verdict finding that General Motors was not negligent in the design of the 1994 GMC Jimmy sports utility vehicle.[3] The trial court entered a judgment dismissing the claims against General Motors.

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than a "failure to warn" case. In light of our resolution of the rebuttal-argument issue, we will not determine whether this was error. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

[3] The jury also awarded damages to Scheer in the amount of $500,000 and to Fulghum in the amount of $20,000. These awards were based upon Lieske's negligence. The plaintiffs do not appeal the damages award.

II. DISCUSSION

¶8 As noted, Scheer and Fulghum claim that "the trial court erred when it prematurely terminated plaintiffs' counsel's rebuttal argument."[4] We agree.

¶9 WISCONSIN STAT. § 805.10 (1999-2000)[5] provides that "[t]he plaintiff shall be entitled to the opening and final rebuttal arguments." Although "counsel has wide latitude in closing arguments," the trial court has the discretion to control the content, duration, and form of the closing argument. ***State v. Lenarchick***, 74 Wis. 2d 425, 457, 247 N.W.2d 80, 97 (1976). *See also* ***State v. Bergenthal***, 47 Wis. 2d 668, 681, 178 N.W.2d 16, 24 (1970). "When restrictions on argument deprive a party of due process in the sense that they result in a fundamental unfairness, a new trial will be granted." ***Lenarchick***, 74 Wis. 2d at 457, 247 N.W.2d at 97. We will reverse where there is an erroneous exercise of discretion that was likely to have affected the jury's verdict. ***Id.***

¶10 In this case, the trial court's actions resulted in a fundamental unfairness. During final argument, counsel for General Motors criticized the

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[4] General Motors asserts that the plaintiffs waived the right to bring an appeal on this issue because they should have moved for a mistrial given the "highly prejudicial" nature of the ruling. The theory behind waiver when a highly prejudicial event occurs at trial is that the aggrieved party must move for a mistrial or it will be assumed that the party preferred to continue in the hope of a favorable jury verdict. ***Pohl v. State***, 96 Wis. 2d 290, 302-303, 291 N.W.2d 554, 559-560 (1980). In this case, however, the plaintiffs' attorney objected to the trial court's ruling and asked the court to bring the jury back to hear the remainder of the arguments. Thus, it is evident that the plaintiffs did not choose to "continue with the trial and take [their] chances with the outcome." ***Id.***, 96 Wis. 2d at 303, 291 N.W.2d at 560 (quoted source omitted). Instead, the plaintiffs' attorney made it clear that he objected to the ruling and did not wish to proceed. This is enough to preserve the issue for appellate review. ***Id.*** (counsel does not preserve an issue for review when he *does not* object, move for a mistrial, or renew a prior motion).

[5] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

plaintiffs' attorney for allegedly mischaracterizing evidence related to the GMC Jimmy's tires and track width, remarking that the plaintiffs' attorney had "[t]he gall that it takes to suggest that all you have to do is widen the track width a little bit to offset the wheels without checking to find out whether we already did that." On rebuttal, plaintiffs' counsel attempted to respond:

[PLAINTIFFS]:	GM now tries to suggest to you that we were unduly brash in not even considering that these are two different wheels, and that they did expand the track width. Well, ladies and gentlemen of the jury, perhaps again counsel didn't remember exactly what the evidence was.
[GENERAL MOTORS]:	Objection to comments about counsel. It's improper argument.
THE COURT:	Counsel. The jury will disregard that last line of argument.
[PLAINTIFFS]:	Counsel was incorrect in his argument, ladies and gentlemen of the jury. And his comment about our being brash was comment about counsel and was incorrect.
THE COURT:	Counsel, you may have a seat. Thank you. Have a seat. Thank you, very much. At this time, members of the jury, this case is ready to be submitted to you for your serious deliberation.

From this exchange, it is evident that the trial court violated the plaintiffs' statutory right to present a rebuttal argument that was specifically addressed to an

argument made by the lawyer for General Motors. The trial court denied plaintiffs' counsel the opportunity to complete his argument, and there were major issues that the plaintiffs could not, therefore, respond to.[6] The result was that the jury only heard General Motors's arguments on some issues. This alone is likely to have affected the jury's verdict—it would have been impossible for the jury to make a fully informed decision on the merits of the case without hearing the plaintiffs' counter arguments. The statute gives plaintiffs the final word.

¶11 Moreover, by terminating the plaintiffs' counsel's argument in front of the jury in such an abrupt manner, the trial court prejudiced the jury against the plaintiffs. It is difficult to imagine how the jurors could have seen the trial court as neutral after witnessing it allow General Motors to present its arguments while cutting off the plaintiffs. Rather, the trial court left the jury with the impression that the it was biased against the plaintiffs. *See* ***Breunig v. American Family Ins. Co.***, 45 Wis. 2d 536, 547, 173 N.W.2d 619, 626 (1970) ("The responsibility for an atmosphere of impartiality during the course of a trial rests upon the trial judge. [Her] conduct in hearing the case must be fair to both sides and [s]he should refrain from remarks which might injure either of the parties to the litigation.").

¶12 Finally, the trial court claimed that it ended the plaintiffs' counsel's rebuttal because his statement about opposing counsel was in "open defiance to [its] ruling[]." This, however, did not give the trial court the authority to

[6] Scheer and Fulghum claim that the trial court denied them the opportunity to rebut many of General Motors's arguments, including: "(1) the plaintiffs' theory would make it impossible to design a sport utility vehicle; (2) the plaintiffs failed to prove the Jimmy was not reasonably fit for its intended purpose; (3) GM's testing was adequate; (4) a vehicle that rides higher is a safer vehicle; (5) the impact with the Lieske vehicle lifted the Jimmy; [and] (6) the damage case demonstrated that plaintiff Scheer wasn't credible." (References to the record omitted.)

completely foreclose the plaintiffs' opportunity to argue. As noted above, counsel has wide latitude during closing arguments. Here, plaintiffs' counsel was merely responding to a damaging argument made by General Motors—that the plaintiffs had the "gall" to present a theory without verifying it. In response the plaintiffs' attorney told the jury that "perhaps" counsel for General Motors "didn't remember exactly what the evidence was" and that the attorney for General Motors was "incorrect."[7] This was a contentious trial and the plaintiffs' attorney was addressing a highly contested point in response to a statement by opposing counsel accusing him of "gall." There are only so many ways to phrase a disagreement with opposing counsel and the plaintiffs' attorney was well within reasonable bounds when he merely stated that General Motors's counsel was "incorrect."

¶13 Accordingly, the trial court erroneously exercised its discretion when it prematurely terminated the plaintiffs' attorney's rebuttal argument. We reverse for a new trial.

By the Court.—Judgment reversed and cause remanded with directions.

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

[7] The trial court also refused to reconsider its ruling because of the plaintiffs' attorney's "continued open defiance to the rulings of the Court" throughout the trial. Under WIS. STAT. § 805.03, when a party fails to comply with a trial court's orders, "the court in which the action is pending may make such orders in regard to the failure as are just." The trial court cannot, however, use its irritation to *entirely* foreclose the plaintiffs' opportunity to argue, when its' closing argument was well within the scope of permitted rebuttal. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 457, 247 N.W.2d 80, 97 (1976) ("counsel has wide latitude in closing arguments").