COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 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. 00-2491

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

JEFFREY VIS,

PLAINTIFF-APPELLANT,

V.

CUSHMAN INC., N/K/A RANSOMES AMERICA CORPORATION,

DEFENDANT-RESPONDENT,

JOHN DOE (UNKNOWN SPOUSE OF),

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD HASSIN, JR., Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Jeffrey Vis appeals from a judgment dismissing his claim against Cushman, Inc. for injuries he sustained when the brakes failed on a

motorized garbage cart manufactured by Cushman. Vis challenges the trial court's failure to grant summary judgment as a sanction for Cushman's failure to comply with the scheduling order and the failure to instruct the jury on industry custom. He also seeks review of limitations of his examination of certain witnesses, the form of the verdict, and the sufficiency of the evidence. We affirm the judgment.

¶2 This is a product's liability action. Cushman manufactured a Haulster, a three-wheeled vehicle for picking up garbage, utilized by Vis's employer, BFI Waste Systems. On July 6, 1995, the Haulster was being operated by another BFI employee when the front brake line burst. The employee was unable to stop the vehicle and it struck Vis, who was standing behind another Haulster. Vis suffered crushing-type injuries.

¶3 At trial, Vis focused on Cushman's failure to equip the Haulster with a dual master brake cylinder as a backup brake system. It was explained that despite end-users licensing the Haulster as a truck, Cushman manufactured the Haulster as a motorcycle and therefore was not governmentally mandated to utilize the backup brake system. Vis also demonstrated that in August 1996, all Cushman Haulsters with twelve inch wheels were recalled because of a defect in the front fork design affecting the front brake line. The Haulster which struck Vis had the same exact braking system as those recalled. Vis's liability expert was of the opinion that Cushman's design of the brake system left the flexible brake hose over-exposed and more easily subject to perforation by road hazards, the sharp front turning radius, and rubbing against protruding bolts.

¶4 Cushman's position was that BFI's modification to the Haulster, the addition of a metal basket to the front, created excessive weight in the front and fatigued the front-end welds, crushing the brake line hose. The jury determined

that the Haulster was not defective when sold to BFI and that Cushman was not negligent in the design, manufacture, or distribution of the vehicle. The jury found that BFI was negligent with respect to modification and maintenance of the Haulster and 100% responsible for the accident. Judgment was entered on the jury's verdict.

¶5 We first address Vis's claim that his motion for summary judgment should have been granted. The motion sought judgment on liability based on Cushman's failure to meet deadlines established in a scheduling order dated October 22, 1997. Vis's motion also sought an order striking any witnesses belatedly named by Cushman.

¶6 A trial court's order regarding sanctions for the failure to comply with a scheduling order involves the exercise of discretion and will not be disturbed absent an erroneous exercise of discretion. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). A harsh sanction, such as dismissal or judgment on the pleadings, is permissible only when bad faith or egregious conduct can be shown on the part of a noncomplying party. ***Id.*** at 275. Further, the court is to consider the overall interests of justice, which includes consideration of whether the party complaining about dilatory conduct has been prejudiced. ***Rutan v. Miller***, 213 Wis. 2d 94, 101-02, 570 N.W.2d 54 (Ct. App. 1997).

¶7 Vis argues that the trial court erroneously exercised its discretion in denying his motion by not identifying the relevant facts and applying a rational process. He also contends that the court exercised its discretion based on an erroneous view of the law. We readily find in the record the trial court's rationale for denying the motion for summary judgment or sanctions. At the motion

hearing, the trial court indicated that the standard scheduling order had been sent prematurely in this case and that the court would not enforce it.[1] The court noted that only its stamped signature appeared on the order and that the court was not aware that the form scheduling order was still being utilized. In its written ruling on Vis's motion for reconsideration, the court explained that the scheduling order was sent at a time when the Waukesha county circuit court judges were questioning the value of that particular form order and that the court had publicly stated that the order would not be enforced until a new order which could be uniformly enforced was developed. The court strongly admonished Cushman's counsel for not complying with the scheduling order when counsel did not know that it would not be enforced. The court found this admonition to be a sufficient sanction in the absence of any actual prejudice to Vis. Additionally, the court remarked that cases should not be dismissed "at the drop of a hat to lessen trial levels." This is an implicit finding that the sanction of summary judgment was too harsh.

¶8 While it is true that Cushman had no excuse for its failure to comply with the scheduling order, that does not entitle Vis to sanctions as a matter of law. The scheduling order directly impacts the trial court's administration of its calendar and the court has inherent authority to permit variations from it. ***Lentz v. Young***, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995). The finding that the scheduling order had been sent prematurely and would not be enforced is reason enough to sustain the trial court's exercise of discretion. Moreover, Vis did not establish prejudice by Cushman's noncompliance. *See* ***Rutan***, 213 Wis. 2d at

[1] At this stage of the litigation, the case was in front of Judge Marianne E. Becker.

104 (prejudice is more than the possibility that the case will proceed to the complaining party's detriment).

¶9 With respect to trial errors, Vis first argues that the jury should have been instructed under WIS JI—CIVIL 1019, which explains that industry practice may be considered in determining whether a manufacturer acted with ordinary care but that the manufacturer's compliance with industry custom "cannot overcome the requirement of reasonable safety and ordinary care." ***Id.*** Vis argues that the instruction was necessary because Cushman held itself out as meeting the federal government's minimum safety standards for motorcycles. He contends that without instruction 1019, the jury was precluded from considering that compliance with the minimum federal standard was not conclusive as to ordinary care.[2]

[2] At trial, Vis argued that the instruction should have been included to suggest that the use of dual master brake cylinders was the standard for a vehicle like the Haulster. His proposed jury instruction based on WIS JI—CIVIL 1019 and submitted to the court in advance of the trial on May 24, 2000, was:

> Evidence has been received as to the practice in the motor vehicle industry with respect to the use of dual master brake cylinders in regards to brake systems and vehicles since the 1960's. You should consider this evidence in determining as to [sic] whether Cushman, Inc. acted with ordinary care in the design and manufacturer [sic] of the Cushman, Inc. three-wheel Haulster. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by persons engaged in similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom, however, cannot overcome the requirement of reasonable safety and ordinary care. A practice, which is obviously unreasonable and dangerous, cannot excuse a person from [responsibility] for carelessness. On the other hand, a custom [or] practice, which has a good safety record under similar conditions, could aid you in determining whether Cushman, Inc. was negligent.

(continued)

¶10 The trial court has wide discretion in instructing the jury. ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 344, 564 N.W.2d 788 (Ct. App. 1997). "As long as the instructions adequately advise the jury as to the law it is to apply, the court has the discretion to decline to give other instructions even though they may properly state the law to be applied. The instructions given are to be considered in their totality to determine whether they properly state the law to be applied." ***Id.*** at 345 (citation omitted).

¶11 The trial court did not give Vis's proposed instruction because there was no evidence regarding the use of master brake cylinders or single master brake cylinders by the only other manufacturer of similar three-wheeled vehicles. We agree that there was no evidence here of industry custom or standards.[3] The federal minimum standards were just that—mandated minimum standards. Federal regulations are not the same as industry custom addressed by WIS JI—CIVIL 1019. The jury was properly instructed on a manufacturer's duty to make the product safe for its intended use and what constitutes a defective product. Since these instructions accurately and sufficiently advised the jury as to the proper legal principles, it was not an erroneous exercise of discretion to refuse an instruction about industry custom.

Vis reproduces yet another version of a proposed instruction in the appendix to his appellant's brief. Although that version is attached to his motions after verdict, its origin is unknown and it is not clear which version the trial court looked at in making its ruling. That proposed instruction began, "Evidence has been received as to the practice in the industry with respect to the use of the single master brake cylinder in the brake system of the 465A Cushman Three Wheel Haulster." The proposed instructions illustrate how Vis has changed his focus on appeal.

[3] Vis points out that Cushman, as the sole manufacturer of the three-wheeled hauling vehicle, "is the industry." This only serves to highlight that there is no industry custom or practice and does nothing to elevate Cushman's compliance with mandated federal minimum standards to an industry standard.

¶12 Vis next claims that his examination of Cushman's liability expert, Robert Ewoldt, was improperly restricted. Vis's argument is difficult to discern. He argues that he was not allowed to impeach Ewoldt's trial testimony that he was not the sole engineer of the Haulster. Vis contends that Cushman's answers to interrogatories, which solely listed Ewoldt as the person responsible for the final design and determination of the composition of the Haulster, were inconsistent and would serve to impeach Ewoldt's trial testimony.[4] We are not convinced that the trial court restricted cross-examination in this regard. Despite Vis's inartfully worded questions, it was brought out that Ewoldt was not the sole design engineer and yet Cushman's interrogatory answer solely listed Ewoldt as the person involved in the determination of the composition of the Haulster. Any limitation Vis feels he may have experienced during this part of his cross-examination was a function of the trial court's effort to minimize jury confusion by eliminating multi-faceted questions and to curb extensive examination on points of only marginal relevance. The trial court properly exercises its discretion in limiting cross-examination which is repetitive or only marginally relevant. ***State v. Whiting***, 136 Wis. 2d 400, 422, 402 N.W.2d 723 (Ct. App. 1987). We conclude that there was no improper limitation on cross-examination.

[4] The interrogatory questions requested Cushman to list the names, last known addresses, and telephone numbers of all persons who were involved "in the final design of the Cushman Haulster" and "the determination of the composition of the Cushman Haulster." Ewoldt was the only name provided in the response. We recognize that at trial Vis was attempting to show a pattern of Cushman's withholding of discovery. However, we agree with the trial court's assessment that the questions at trial and in the interrogatories were not looking for the same information.

¶13 Vis also claims that his examination of his own liability expert was improperly restricted.[5] Vis describes the prohibited examination as seeking to elicit opinions based on the deposition testimony of another Cushman representative about discussions Cushman had in 1992 about installing dual master brake cylinders. But for Vis's reference to WIS. STAT. §§ 907.03 and 907.04 (1999-2000),[6] the argument is undeveloped. We need not consider arguments broadly stated but not specifically argued. ***Fritz v. McGrath***, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988). It is sufficient to note that once again the trial court's guidance throughout the examination was geared toward confining the expert's testimony to his area of expertise and moving the trial along. There was no error.

¶14 We turn to consider Vis's claim that it was error to submit to the jury two enlarged photographs of the Haulster taken twenty-six months after the accident. Whether exhibits should be sent to the jury room is within the trial court's discretion. ***Douglas-Hanson Co. v. BF Goodrich Co.***, 229 Wis. 2d 132, 153, 598 N.W.2d 262 (Ct. App. 1999), *aff'd*, 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621. We will uphold the trial court's discretionary determination unless it

---

[5] Along with this argument, Vis contends that he was denied the opportunity to cross-examine Cushman's liability expert. The argument fails to identify the expert and the record citation provided with the argument is nonexistent. We need not address a claim not supported by adequate citation to the record. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. For the first time in his reply brief, Vis claims that the trial court refused to permit his cross-examination of Ewoldt regarding discussion of brake line problems in 1993 in the State of New York. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). Moreover, it appears that the limitation on cross-examination was decided in an unrecorded side bar. The issue is waived for Vis's failure to make an offer of proof preserving the issue for appeal. *See* ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996).

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

is wholly unreasonable or the only purpose of the photographs is to prejudice the jury. ***State v. Thompson***, 142 Wis. 2d 821, 841, 419 N.W.2d 564 (Ct. App. 1987).

¶15 The pictures were used at trial over Vis's objection and admitted into evidence without objection. The jury asked that all enlarged pictures be sent to the jury room. Vis argues that he was prejudiced by the delivery of the pictures to the jury room because they were remote in time and bore no relevance to the condition of the Haulster at the time of the accident. The trial court permitted the photographs to go to the jury because the jury was fully informed that the pictures had been taken well after the accident occurred. The court found the pictures to be demonstrative of the way the basket was made part of the Haulster. We conclude that the trial court's decision was reasonable. The potential prejudice was reduced because the jury knew the pictures were not taken on the day of the accident.

¶16 Vis cites two problems with the form of the verdict. First, that the issue of vehicle maintenance and training was included on the verdict.[7] Second, that the verdict did not include the stipulation regarding Vis's past wage loss. "A special verdict must cover material issues of ultimate fact. The form of a special verdict is discretionary with the trial court and this court will not interfere as long as all material issues of fact are covered by appropriate questions." ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 445-46, 280 N.W.2d 156 (1979) (citations omitted). Whether evidence exists which warrants submission of an issue to the jury is a question of law that we decide without deference to the trial court. ***Zintek***

[7] Question nine on the special verdict asked, "Prior to or at the time of the accident, was BFI negligent with respect to its modification or maintenance of the Cushman Haulster or in training its employees?"

v. Perchik, 163 Wis. 2d 439, 454, 471 N.W.2d 522 (Ct. App. 1991), *overruled on other grounds by* ***Steinberg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995).

¶17 Vis argues that BFI's maintenance and training should not have been part of the jury's inquiry because Cushman had not alleged maintenance and training as an affirmative defense. The specific nature of BFI's negligence was not an affirmative defense that is waived if not raised by a responsive pleading. *See* WIS. STAT. § 802.02(3). It is enough that Cushman raised as an affirmative defense that some other party was responsible for Vis's damages. There was evidence to support the inquiry on BFI's maintenance and training in relation to the Haulster. Most notable in this regard is Ewoldt's testimony based on review of the repair records for the Haulster. He found numerous repairs were done with used parts, welds were rewelded on several occasions without an examination as to the cause of the broken welds, and that the number of times welds were repaired was indicative that the machine was being heavily and improperly loaded. Ewoldt also opined that improper maintenance could have been the reason that warranty reports from BFI were ten times higher than any other Haulster user. There was sufficient evidence to support the question in the verdict.

¶18 We need not address the claim that the parties' stipulation of lost wages paid by BFI as worker's compensation should have been included on the verdict. We affirm the no negligence verdict and the jury's determination of damages is of no consequence. The issue is moot. Even considering the issue, we conclude that the trial court properly exercised its discretion. The stipulation merely covered BFI's worker's compensation liability. Vis was actually looking for an award of lost wages greater than that covered by the stipulation. Including the stipulation on the verdict would have confused the jury as to that element of damages and required an explanation of why the stipulation was not binding on

that element. Moreover, as the trial court noted, the stipulation embodied a calculation outside the evidence presented to the jury.

¶19 Finally, we consider Vis's argument that negligence exists as a matter of law because Cushman admitted that it did not test the product and had no reason for not utilizing a dual master brake cylinder system. Because Vis seeks to set aside the jury's verdict, the issue is really whether the jury's verdict is supported by sufficient evidence. "Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding." ***Morden v. Cont'l AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). In applying this narrow standard of review, an appellate court considers the evidence in a light most favorable to the jury's determination. ***Id.*** at ¶39.

¶20 We first note that this was not a case appropriate for a ruling as a matter of law. Many questions of fact needed to be resolved by the jury. We conclude that there was sufficient evidence to support the jury's verdict. What Vis fails to recognize is that even though Cushman's admissions may be grounds for negligence, they do not establish causation. Cushman established that BFI's modification to the Haulster was a cause of the accident. The jury's verdict is affirmed.

By the Court.—Judgment affirmed.

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