COURT OF APPEALS
DECISION
DATED AND FILED

August 14, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2550

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

STEPHEN J. KASUN, JR., AND
EDNA KASUN, HIS WIFE,

PLAINTIFFS-APPELLANTS,

V.

OWENS-ILLINOIS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Stephen J. Kasun, Jr., and his wife, Edna Kasun, appeal from the judgment, following a jury trial, dismissing their action against Owens-Illinois, Inc., and from the circuit court's denial of their postverdict

motions. They present numerous arguments, all of which we reject. Accordingly, we affirm.

I. BACKGROUND

¶2 Stephen Kasun worked full-time as an insulator from 1948 to 1984. Throughout his career, he worked with various kinds of insulation products, including those containing asbestos. One of the products containing asbestos was Kaylo, a pipe-insulation material manufactured by Owens-Illinois until 1958.

¶3 In 1998, Stephen Kasun was diagnosed with malignant mesothelioma, a type of cancer associated with exposure to asbestos. As a result, he and his wife, claiming negligence and strict liability, sued Owens-Illinois and other companies that had designed, manufactured, and sold asbestos-containing products with which he had worked. They specifically alleged that Owens-Illinois and other manufacturers had failed to "adequately warn [him] of the health hazards of asbestos." By the time the jury was impaneled in 2000, however, Owens-Illinois was the only remaining defendant; according to the parties' briefs, the others had settled or were in bankruptcy.

¶4 At trial, Owens-Illinois conceded the dangers of Kaylo. Its theory of defense, however, was that it had reasonably concluded, based on the results of scientific research available at the time during which it produced Kaylo, that the asbestos contained in Kaylo, and in the dust generated by working with it, presented no danger to insulators. Thus, Owens-Illinois maintained at trial, it neither knew nor should have known of the danger to Kasun and, therefore, it had no duty to warn him of any danger.

¶5 The Kasuns do not dispute that the evidence provides support for Owens-Illinois' contention that during the time it manufactured Kaylo, scientific research had not established that the level of exposure to asbestos associated with working with Kaylo presented a danger to insulators. The Kasuns acknowledge the evidence that this remained the accepted understanding until the 1964 publication of a study linking asbestos-containing insulation materials to asbestosis, lung cancer, and mesothelioma among insulators who had used such products. The issues on appeal, therefore, derive not from the trial evidence but from the verdicts.

¶6 The special verdict form had fifty-five questions. The first thirty repeated three questions regarding negligence for each of ten manufacturers. The next twenty repeated two questions on strict liability for each of the ten manufacturers. Questions 51-53 concerned causation and damages. Questions 54 and 55 concerned punitive damages.

¶7 Question 1 asked, "Did defendant, Owens-Illinois, know or should it have known about the health hazards of asbestos[-]containing products manufactured or sold by Owens[-]Illinois at any[]time before any of Stephen Kasun's exposure to those products?" The jury answered, "Yes."

¶8 Question 2 asked, "If you have answered Question No. 1 'yes', then answer this question: Was Owens-Illinois negligent in failing to put a warning on asbestos[-]containing products?" The jury answered, "No."

¶9 Question 3 asked, "If you have answered Question No. 2 'yes', then answer this question: Was Owens-Illinois' negligence a cause of Stephen Kasun's disease?" Because the jury had answered question 2, "No," it did not answer question 3.

¶10 Questions 4-30 asked the same three questions for the other nine manufacturers; the jury answered that each manufacturer knew of the health hazards of its asbestos-containing products but was not negligent in failing to place a warning on such products. The jury therefore did not go on to address whether negligence of any of these manufacturers caused Stephen Kasun's disease.

¶11 Question 31 asked, "Were the asbestos[-]containing products when they left the possession of defendant Owens-Illinois in such defective condition as to be unreasonably dangerous to person [sic] working with or around them?" The jury answered, "No."

¶12 Question 32 asked, "If you answered Question No. 31 'yes' then answer this question: Was defendant Owen-Illinois's manufacture or sale of unreasonably dangerous asbestos[-]containing products a cause of the disease of mesothelioma in [Stephen] Kasun?" Because the jury had answered question 31, "No," it did not answer question 32.

¶13 Questions 33-50 asked the same two questions for the other nine manufacturers; because the jury answered that each manufacturer's asbestos-containing products were not unreasonably dangerous, it therefore did not go on to address whether the manufacture or sale of such products caused Stephen Kasun's mesothelioma.

¶14 For the most part, the issues in this appeal arise from question 2 and its possible relationship to question 51, which was prefaced by: "REGARDLESS OF HOW YOU ANSWERED the previous questions, answer the following questions." Question 51 then asked: "Taking 100% as the total, what is the percentage of fault which contributed to cause the disease of mesothelioma in

[Stephen] Kasun?" Question 51 then listed the ten manufacturers and Stephen Kasun. The jury answered by assigning 0% fault to Kasun, 10% fault to Owens-Illinois, and various other percentages of fault, from 0 to 33, to the other manufacturers.

¶15 In postverdict motions, the Kasuns moved for

> entry of judgment in favor of plaintiffs against defendant Owens-Illinois, to change the answer to verdict form Question 2 from "no" to "yes" or to strike the answer, to strike or change the percentage of fault answers to Question 51 and to strike or change the answers as to other companies on the questions of knowledge and negligence.

Alternatively, they moved for a new trial on several theories, including the following grounds related to the special verdict form: (1) the jury's answers to questions 1 and 51 were inconsistent with its answer to question 2; (2) the special verdict form did not contain the questions they requested regarding potential negligent acts other than failure to warn, thus preventing the jury from properly determining comparative negligence; (3) question 2 was submitted in an improper form; and (4) the other manufacturers should not have been included on the special verdict form.

¶16 Denying the Kasuns' postverdict motions, the trial court stated its belief that its instructions to the jury were proper and continued:

> [A]ny error, and the main error would be 51, was committed by this Court in stating the preface, telling them to answer it no matter what, and I accept the defense argument that Question 51 therefore is immaterial and does become a nullity and the Court so finds, and I find specifically that 51 cannot be bootstrapped into a finding of negligence and the change in the verdict answers and an order for a new trial or an order for judgment against the defendants on behalf of the plaintiffs.

II. DISCUSSION

A. Questions 2 and 51: Consistent Verdicts

¶17 The Kasuns first argue that the jury's answers are *consistent* and require a verdict in their favor. Verdicts are consistent when the jury's answers are not "logically repugnant to one another." *See* ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 228, 270 N.W.2d 205 (1978).

¶18 The Kasuns maintain that we can reconcile the verdicts on questions 2 and 51 with a reasonable interpretation: the jury found that Owens-Illinois was not negligent for failure to warn, but was liable due to some other "action or omission." The Kasuns contend, "Based upon the evidence presented at trial, the jurors could find other negligent acts such as negligent design of the product; failure to redesign or withdraw the product after [Owens-Illinois] knew of the hazards of asbestos; failure to instruct about proper safety precautions; and failure to investigate the safety of the product."

¶19 Owens-Illinois responds: "The jury was entitled to conclude that Mr. Kasun's injuries were caused by multiple exposures to asbestos-containing insulation products, yet also determine that none of the manufacturers of those products was negligent because all adhered to the then-existing state of the art. Plainly this is what the jury did." We agree. Thus, without embracing the Kasuns' interpretation, we can reconcile the verdicts.

¶20 Owens-Illinois' argument makes sense; it is consistent with the wording of the verdicts on questions 2 and 51. The Kasuns' theory, on the other hand, requires an illogical leap. To embrace it, we would have to interpret question 51—"Taking 100% as the total, what is the percentage of fault which

contributed to cause the disease …?"—as one asking the jury to determine *whether* Owens-Illinois or any other manufacturer was negligent in any way. The question, however, simply does not ask that; it seeks only the jury's determination of comparative, causative "fault" *assuming* that "fault" occurred.

B. Questions 2 and 51: Inconsistent Verdicts

¶21 The Kasuns next argue, in the alternative, that the verdicts are fatally *inconsistent* and, therefore, that a new trial is required. "When reviewing a jury verdict to determine whether it is fatally inconsistent, [we] will uphold the verdict when the record is such that the jury could have made both of the findings that are claimed to be inconsistent." *See* ***Sharp v. Case Corp.***, 227 Wis. 2d 1, 20, 595 N.W.2d 380 (1999). Here, the jury could have made both of the findings; the jury could have allocated "percentage of fault which contributed to cause the disease" in answering question 51 without undermining its finding of no negligence in question 2.

¶22 Once again, the Kasuns' argument is premised on the theory that question 51 was asking *whether* Owens-Illinois was negligent. But question 51 begins by saying, "Taking 100% as the total." Therefore, question 51 *assumed* "fault" and, therefore, asked only for an allocation of liability *assuming that "fault" occurred*. Therefore, the verdict on question 51 provided the jury's answer to a hypothetical question, the factual premise for which was absent by virtue of the jury's answer on question 2. Thus, the Kasuns' argument that the verdicts were inconsistent fails; it is premised on the existence of "fault" or, perhaps, negligence—a finding that the jury never made.

C. Question 1: Negligence as a Matter of Law

¶23 The Kasuns also argue that "[t]he jury's answer to question 1 on the special verdict, combined with Owens-Illinois' stipulations of failure to warn, establish negligence as a matter of law." While the Kasuns' argument is intriguing, and while in theory, perhaps, it could have some merit, it ultimately fails upon a careful, commonsense reading of question 1.

¶24 On question 1, the jury found that Owens-Illinois knew or should have known "about the health hazards of asbestos[-]containing products" it had manufactured. The Kasuns argue, however, that the jury, in answering "yes" to this question, found that Owens-Illinois knew or should have known that *Kaylo* was hazardous and, therefore, that such a factual finding created a legal duty for Owens-Illinois to warn of Kaylo's hazards. But this argument depends on a substantial re-wording of the question—converting knowledge "about the health hazards" (which, theoretically, could even be knowledge that a product was *not* hazardous), to knowledge "that Kaylo was hazardous."[1] Further, as Owens-Illinois responds:

> The plaintiffs misapprehend the scope of Question No. 1. The question asked only about "health hazards of asbestos [-]containing products manufactured or sold by Owens-Illinois." Owens-Illinois actively sought information about whatever health hazards its product could pose—as Owens-Illinois itself emphasized at trial. What it learned from its inquiry was that Kaylo dust *could* cause fibrosis if breathed in huge quantities over an extended time (though it also

[1] The parties and the trial court had a lengthy discussion on the exact terms of question 1. Reviewing that discussion carefully, we appreciate that the Kasuns may have agreed to question 1 believing that it connoted certain concepts that now support their arguments on appeal. We must not assume, however, that the jury would have interpreted the question as the Kasuns do. We must consider exactly what question 1 asked *the jury*, not what question 1 may have meant to *the parties*.

> learned the accepted medical view at the time that end users did not encounter such huge exposures). The jury's "yes" answer to Question No. 1 indicates only that Owens-Illinois was aware of those potential health hazards, not that Kaylo was unreasonably dangerous to end users or required a warning.

Thus, the jury was entitled to accept Owens-Illinois' theory of defense: that although it believed that it knew of the hazards of asbestos-containing products, generally, and although it believed that it knew of the hazards of the products it produced, it had reasonably concluded that Kaylo presented no danger to insulators.

D. Other Forms of Negligence

¶25 The Kasuns also argue that the trial court erred in failing to include questions about other forms of negligent conduct, in addition to the failure to warn. Here, the Kasuns, in theory, could have a tenable argument wholly independent of their challenges relating to question 1, and to the interplay between questions 2 and 51. After all, as both parties acknowledge, WIS. STAT. § 805.12(1) (1999-2000)[2] states, "In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent." Thus, in question 2, had the trial court asked a question about negligence, generally, the question properly would have covered the field. Opting instead, however, to ask a question about failure-to-warn negligence, specifically, the court also would have been obligated to ask additional, specific questions on other forms of negligence, requested by the parties and supported by the evidence.

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

¶26 The Kasuns contend that they "presented evidence of many forms of negligent behavior, such as negligent design of the product, failure to redesign or withdraw the product, failure to properly test the product, and failure to instruct about proper safety measures for the product." Perhaps; but they also claim that they "requested questions about negligence other than failure to warn, but these questions were not included, over plaintiffs' objections." Were there any doubt about their assertions, the Kasuns reiterate, "In fact, plaintiff tendered proposed questions on several other theories of liability, and objected on the record to their exclusion." They also maintain that they "tendered questions for the jury regarding several theories of negligence," and that "[t]he failure to include plaintiffs' tendered instructions on other negligent conduct constituted error."

¶27 Owens-Illinois responds that "the plaintiffs waived all objections to the scope of Question No. 2 by failing to request either a more general negligence question or additional specific negligence questions on the areas that they now assert in their brief (e.g., concerning design defect or failure to withdraw the product)." Owens-Illinois then adds that "[t]he only additional instructions the plaintiffs requested concerned the duty to instruct on safe measures and the duty to further investigate." (Owens-Illinois also maintains that the trial court did not err in denying those instructions because "the failure-to-warn instruction and Question No. 2 encompassed all of the ways [in which] Owens-Illinois [arguably] could have been negligent.")

¶28 The Kasuns reply:

> Owens-Illinois claims that Question 2 encompasses all grounds on which [Owens-Illinois] could have been found negligent. This is incorrect. Plaintiffs presented evidence on numerous aspects of [Owens-Illinois'] conduct, other than failure to warn, from which the jury could have found negligence. Contrary to [Owens-Illinois'] statements,

> plaintiffs tendered additional questions on [Owens-Illinois'] conduct. *Plaintiff's* [sic] *proposed jury form questions 6 through 11 ask about failure to instruct about safety measures, failure to test the product, and defective design of the product. Plaintiff proposed these questions again at the jury instruction conference; the court declined to include these questions. When it became clear that there would not be several specific questions, plaintiff's* [sic] *attorneys attempted to reword the remaining question to make it more general. This also was unsuccessful. Plaintiffs preserved these objections* and reiterated them in post-verdict motions and in hearings on those motions. These objections were not waived.

(Record references omitted; emphasis added.)

¶29 Reviewing all portions of the record the parties have cited in their briefs, we see that the Kasuns' trial counsel did indeed submit proposed jury instructions for: (1) question 6—failure to adequately instruct Stephen Kasun about safety precautions; (2) question 7—failure to adequately instruct about precautionary measures; (3) question 8—failure to properly investigate or study the health hazards of asbestos for persons working with or around asbestos-containing products manufactured or sold by Owens-Illinois; (4) question 9—failure to adequately investigate or study the health hazards; (5) question 10—product designed in defective manner; and (6) question 11—defective product design being a cause of Stephen Kasun's disease.

¶30 But referring to several pages of the record to which the Kasuns conveniently fail to refer—pages immediately preceding what they claim was the point at which they "proposed these questions again at the jury instruction conference"—we see that counsel explicitly withdrew his requests for these

verdict questions. Question by question, he repeatedly said that they would not be needed.[3]

¶31 What the Kasuns claim as "propos[ing] these questions again" was no such thing. Counsel, after explicitly withdrawing his requests, merely commented:

> I agree to some follow-up probably but these aren't—I mean a jury is not going to be asked on every question if he's stipulating that there's not a warning, things like that, which I understood, then—but if he's not, now he's asking should that—should that create a duty to warn, not only the duty to warn but a duty to instruct him about safe measures, a duty to do further investigation if they weren't completely sure.

It is difficult to discern exactly what that means. It is clear, however, that it is anything but a proposal for the trial court to utilize the verdict questions counsel had just withdrawn. Thus, while in theory the Kasuns may be offering a tenable legal position, we conclude that they have waived the arguments they now attempt to pursue.[4]

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[3] Counsel, in this fashion, explicitly withdrew his requests for questions 6 through 10. As noted, the Kasuns' appellate brief also refers to question 11. That question, however, did not propose a separate negligence theory. Instead, it asked whether "Owens-Illinois's defective design for asbestos[-]containing products" was "a cause of [Stephen] Kasun's disease of mesothelioma," and it was preceded by an instruction that it only was to be answered if the jury had answered "yes" to the preceding question—a question that counsel had withdrawn.

[4] We also note that the trial court, in formulating question 2, commented:

> [The defense is] going to say, yes, we didn't warn. So what? I think that's to simplify an argument here. We didn't put a warning on because we didn't have the information, so how could we put a warning on when we didn't have sufficient information? You're arguing, of course they had sufficient information to put a warning on. That's for them to decide.

(continued)

E. Evidence of Other Exposures to Asbestos

¶32 Finally, the Kasuns maintain that the trial court erred in allowing "irrelevant evidence" of Stephen Kasun's exposure to other manufacturers' asbestos-containing products—evidence that they argue "should have been excluded as a matter of law." Again, we disagree.

¶33 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." WIS. STAT. § 904.01. Further, as Owens-Illinois points out, "Wisconsin law plainly requires that both party and non-party negligence be determined in negligence actions, because Wisconsin subscribes to 'the equitable precept that a negligent party only pay for its fair share of the total negligence.'" (quoting ***Unigard Ins. Co. v. Ins. Co. of N. Am.***, 184 Wis. 2d 78, 84, 516 N.W.2d 762 (Ct. App. 1994)). Here, we conclude, the evidence related to Kasun's exposure to the products of the other manufacturers was relevant.

¶34 The Kasuns contend that "[a]ny exposure to asbestos is individually capable of causing the plaintiff's injury in its entirety" and that "evidence of exposure to other products is irrelevant as it does not make the fact that the Owens-Illinois exposures caused Kasun's disease more or less probable." We disagree. Obviously, if Kasun had been exposed only to Kaylo, the likelihood of

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In short, Owens-Illinois maintains that this case was about an alleged failure to warn. Apparently, the Kasuns and the trial court agreed. The Kasuns' other negligence theories may not have been incompatible with their failure-to-warn theory and, depending on the evidence, either a general negligence instruction or additional specific instructions might have been appropriate. But the Kasuns not only have waived this issue but, on appeal, fail to point to any evidence that would have supported an instruction on any other theory.

Owens-Illinois' responsibility for his disease could have been much greater than if Kasun had been exposed to other asbestos-containing products as well. Thus, evidence of Kasun's possible exposure to other manufacturers' asbestos-containing products was relevant to the jury's evaluation of Owens-Illinois' responsibility.[5]

III. CONCLUSION

¶35 "Our standard of review of a jury's verdict is severely circumscribed. We must affirm the jury's verdict 'if there is any credible evidence to support [it].' When the verdict has the trial court's approval, this is even more true." ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996) (quoted source omitted). Rather than searching the record for "evidence contrary to the jury's verdict," we are required to "search the record for credible evidence in support of the verdict, accepting any reasonable inferences favorable to the verdict that the jury could have drawn from that evidence." ***Id.***

¶36 Although the Kasuns have identified some arguable uncertainties created by the interplay of questions 2 and 51, those uncertainties ultimately are inconsequential because, once the jury found no negligence, its answers on question 51 were immaterial. Therefore, in denying the Kasuns' postverdict motions, the trial court correctly concluded that question 51 should not be considered in determining the propriety of the verdicts. Moreover, the verdicts on

[5] The Kasuns also argue, "The jury's finding that the absentee tortfeasors knew or should have known of the hazards of their asbestos-containing products must be stricken because Owens-Illinois did not present any credible evidence of knowledge." The Kasuns fail to explain, however, what impact the jury's verdicts regarding the other manufacturers could possibly have on the issues on appeal. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider insufficiently developed arguments).

questions 2 and 51 can be reconciled in a way that logically supports the trial court's denial of the Kasuns' postverdict motions. And although, in theory, the Kasuns might have been entitled to additional specific negligence theory instructions, they waived their request for such instructions.

By the Court.—Judgment affirmed.

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